









THE DANGER OF  
BEING A GENTLEMAN

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AND OTHER ESSAYS

# THE DANGER OF BEING A GENTLEMAN

*and Other Essays*

*by*

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*To*

HUGO AND JOSEPHINE BLACK



## PREFACE

I CANNOT, I fear, claim that this book has any greater unity of theme than the fact that most of its essays deal with subjects it is my professional duty to study. I have ventured to reprint them mainly because most of them are now unobtainable, and some of them are still asked for by students and friends.

I have to thank Messrs. Harper and Brothers for permission to reprint Essays I and VIII; The Oxford University Press and Sir Humphrey Milford for permission to reprint Essay II; Essays IV and V originally appeared in *Politica*, and are reprinted here by leave of the London School of Economics and Political Science; the Hogarth Press kindly allowed me to include Essay III, and the Conway Memorial Trustees and Messrs. Watts, Essay VII. Essay VI originally appeared in a *Century of Local Government* (1935) and is here reprinted by permission of Messrs. George Allen & Unwin.

H. J. L.

LITTLE BARDFIELD  
ESSEX





# CONTENTS

	PAGE
Preface	9
CHAPTER	
I. The Danger of Being a Gentleman: Reflections on the Ruling Class in England (1932)	13 <sup>l</sup>
II. On the Study of Politics (1926)	32
III. Law and Justice in Soviet Russia (1935)	57 <sup>✓</sup>
IV. The Judicial Function (1936)	98 <sup>✓</sup>
V. The English Constitution and French Public Opinion, 1789- 1794 (1938)	124
VI. The Committee System in English Local Government (1936)	147
VII. Nationalism and the Future of Civilization (1932)	189
VIII. Mr. Justice Holmes: For His Eighty- ninth Birthday (1930)	227



## CHAPTER I

### *The Danger of Being a Gentleman: Reflections on the Ruling Class in England*

#### I

IT is the boast of England that the idea of being a gentleman is peculiar to her people, and I think there is solid substance in the boast. As an ideal, it has at least the supreme merit of simplicity. The gentleman is, rather than does; he maintains towards life an attitude of indifferent receptivity. He is interested in nothing in a professional way. He is allowed to cultivate hobbies, even eccentricities, but he must not practise a vocation. He must not concern himself with the sordid business of earning his living; and he must be able to show that, at least back to his grandfather, none of his near relations has ever been engaged in trade. It is desirable that he should have attended one of a limited number of schools, preferably Eton or Harrow; and it is practically essential that he should have been to Oxford or Cambridge. He must know how to ride and shoot and cast a fly. He should have relatives in the army and navy, and at least one connection in the diplomatic service. It is vital that he should belong to a club, urgent that he be a member of the Conservative Party, and desirable that his ideas should coincide with those of the *Morning Post*. An ability to endure the Riviera in the winter, and to make the round of English country houses from August to

November is a valuable, though not an integral, part of his equipment.

These may be termed the foundations upon which the ultimate superstructure is raised. But there are certain emotional and intellectual penumbræ which should not go unemphasized. His favourite authors should be Surtees and Kipling. He should deprecate the moral elasticity of modern fiction. He should feel the fine sanity of Gilbert and Sullivan while he is alien to any profound concern about Beethoven or Mozart. He should know how to arrive late at the opera, and his feeling about the theatre should be that a man wants to be amused there. A visit to Paris should leave him with a sense of pleasant proximity to sin, and he should be quite unable to speak intelligible French or German. He should play most games in some fashion and feel that their cultivation is the secret of national greatness; but he should play none so well that he is thereby distinguished from his fellows and he should be convinced that professionalism ruins the true spirit of sport. Under no circumstances can he be a teetotaller except upon medical grounds.

Certain other qualities are important. He should know nothing of political economy and less about how foreign countries are governed. He should equate bolshevism with original sin. While he should never be a free-thinker, he should not be enthusiastic about religion; to be so is to run the risk of obtrusiveness. He should be properly conscious of the merits of Empire and feel that only the strong hand can maintain our prestige in the East. When he dines out he must be able either not to talk at all or to confine

his conversation to that plane which indicates a full knowledge of the right gossip without being an index to a dangerous profundity in any special theme. He must feel that America is passionately materialist; but if he marries an American he must take care to ally himself only with those properly endowed families who are received into the best London houses. He may be good at gardening. He may become a director of a company, provided he is not too well informed about its business. He must find speech difficult, and eloquence impossible. He must feel intensely the moral beauty of good form; and he must recognize that to wear, for instance, a black tie with a tail coat in the evening is proof (unless one is a head waiter) of a debased origin which cannot be outgrown. If, finally, he travels he must return without having suffered the deformation of a broader mind.

There are great qualities in the English gentleman which must not be overlooked. He believes with ardour in playing the game with those of his own status. He has the habit of graceful command. Save to Indians, Socialists, trade union organizers and poachers, he is almost uniformly tolerant. He is invariably courageous and, to women of his own class, chivalrous and deferential. He rarely parades his vices and he has a horror of ostentatious virtue. If he forgets to pay his tailor, he is always punctual with gambling debts. He profoundly respects the Royal Family (of whose failings he breathes no word in public), and bishops, and those Ministers of the Crown who belong to his own party. He rarely pushes a claim too far and he is too intellectually humble to take long-term

views. If he grumbles much, at least he can laugh at himself; and no one is so apt to extricate himself skilfully from a dangerous situation. He enjoys the exercise of power; and since he rarely knows how to make money, it is still more rare for him to be corrupted by it. Having, in general, received a classical education, he has, like Shakespeare, as a rule, small Latin and less Greek.

He is the type by whom, with the aid of the lawyer, England has been governed until the last half-dozen years; it is only since the War that his supremacy has been seriously threatened. For the greatest event in English history was the fact that we have had no revolution in the modern time. Our social structure has remained largely unchanged since at least the middle of the eighteenth century; and a people with a genius for deference has preserved almost entirely the allotted privileges of leisure and of station. Your average Englishman still admires the class which does not have to earn its living; he feels safe and respectable in its hands. He may have doubted Lord Rosebery when he published a book; but he admitted his title to the Premiership when he won the Derby. Between a self-made Welshman like Mr. Lloyd George and a squire whose mind, like that of Mr. Henry Chaplin, is unstained by thought, the Englishman has seldom hesitated to choose the latter type. The workingman rarely respects his master; it is rare for him not to respect the peer who lives by owning. The employer may like the individual worker but, in the mass, he is convinced of his unfitness to govern; free trade apart, therefore, all his natural aspirations



tempt him to look upwards to the class which represents past tradition and the glamour of high estate. Since the gentleman has always realized how much his power depends on the prosperity of business, the alliance between them has been mutual; and intermarriage with the more eminent of the business community has always persuaded the latter that the preservation of the gentleman is his own best safeguard. And the gentleman's tenacious hold of power has given him something like an instinctive knowledge of when compromise and concession are desirable. However much he may have opposed the wants of other classes, he has never so far challenged them as to threaten his own security. His genius for compromise and his capacity for absorption have given him control for two hundred years of English destiny.

II

The condition upon which he maintained his supremacy was simple enough. For a century after the Industrial Revolution, England's commercial leadership was unchallenged. The state was largely a negative state, and there were neither grave economic nor grave international problems to solve. The prosperity of the upper and middle classes was solid and ample and, save for the brief moment of the Chartist Movement, the rights of private property were never in serious question. England was in a position to afford government by gentlemen. No one had, in politics at least, to take long views; and the main questions in issue did not seem to require any complicated or



technical *expertise*. Just enough national education to produce the foreman who could read and write; just a high enough level of national health to prevent the recurrence of cholera and typhus; a well-advertised charity to meet the wants of the really deserving unemployed—upon these foundations Englishmen might well feel that their lines were fallen in pleasant places. Political economists proved to demonstration that the more exuberant hopes of the working class were impossible of fulfilment; and the capitalist had the satisfaction of knowing that his abstinence made him the effective author of the prosperity which was the wonder of the world.

In that epoch, indeed, the gentleman imposed himself upon civilization. No one in England seriously challenged his right to leadership; and English domination of foreign markets made his habits the example upon which the leisured class of every other state sought to model itself. All the best people used English materials; and their solidity and workmanship gave them an unquestioned title to pre-eminence. The gentleman's conquests were unending. He made it the right thing to go to the Riviera, to Switzerland, to Egypt. His picture galleries formed the basis of future American triumphs. He made the world mad on golf and tennis; he invented the week-end; he showed how to polish the rough edges of business enterprise by casting the kindly eye of patronage upon the more expensive fine arts. To the theory that a little learning is a dangerous thing, he invented the reply (which England, at least, accepted) that much learning is ungainly, and in any case drives men mad.

He made Wimbledon and St. Andrews into international cathedrals; while fashionable women of all countries went to St. James's and Ascot as a Mahometan might go to Mecca. Until, at any rate, the outbreak of the War, the gentleman had persuaded the world to believe that he was the final term of human evolution.

Men, of course, there always have been who doubted the hypothesis; but they have been too few in number to affect the argument. One has only to read the letters of Ambassador Page to see how a distinguished American could fall, even in middle age, beneath the gentleman's spell. One had only to meet Lord Balfour to appreciate the exquisite artistry of the type. One might resent Lord Curzon's superb insolence; at least it was impossible to deny that so imperial a manner was obviously born to rule. And those who doubted were, after all, for the most part unsuccessful men—exiled scholars like Marx, dypseptic prophets like Carlyle, thin-lipped and poverty-stricken agitators like Philip Snowden, poetic craftsmen like William Morris. Who listened in America to Debs or Henry Demarest Lloyd while the gilded age was coming to maturity?

There is, in fact, little evidence that before the War Englishmen, at least, questioned the title of the gentleman to lead them. There were passing waves of unrest; but, in general, the sense of security was sufficiently widespread for so careful an observer as President Lowell to report that the British Labour Party was destined to remain a mere wing of Liberalism. The gentlemen of England had made her what she was; not merely Waterloo was won upon the playing fields

of Eton. The traditions they embodied saved England from the materialism of America. They prevented her from seeming, like the new industrial Germany, a nation of *nouveau riches*. Her tolerance, permitted wide dissidence of opinion. Her social experiments showed the amazing adaptability of her ideas. The War proved not only that her gentlemen knew how to die; the solidity of her credit in crisis showed that she had absorbed the best lessons of bourgeois economy. Matthew Arnold's plea that England needed to temper her gentlemanly tradition by a dose of social equality seemed largely falsified, at least to the gentlemen themselves, by the victory of 1918.

### III

Yet it may be predicted with some certainty that the historian of England in the last century will be largely occupied in explaining the dangers of being a gentleman. For no small part of the present difficulties of England are the outcome of his leadership. He has been the model to imitate, the example to follow. His habits, his tastes, his way of life have determined the conduct of all save a small handful of insurgent Englishmen. Broadly speaking, his philosophy has been a refusal to think in terms of principle. Do not be forehanded. Meet the day's problems as they arise. Make your ideal of life one in which there is neither excessive effort of intelligence nor undue ardour of emotion. Follow your own bent and assume that the world will adjust itself to your requirements. Be suspicious of the thinker and sceptical of the man who

dwells upon the heights. Be so certain of yourself that your code of behaviour is imposed as a universal. Never doubt your superiority over other people. Never show yourself so ardent in pursuit of an object as to convince the foreigner that you may be pained by failure to attain it. Take life as a game in which excessive seriousness is fatal to the spirit of play. Never be driven by a purpose so as to be its slave; thereby like Robert Owen and Bentham, Clarkson and Plimsoll, you may become a bore to other people. Remember that manners and tradition give to life that dignified emollience without which it loses half its savour. Be sure that in every sort of conflict the rules (which you must take care to make) are more important than the victory. Never allow the unpleasant to obtrude. Do not discuss inconvenient truths if there is danger that they may give offence.

The roots of this attitude are historically clear. They result from the mingling of the aristocratic ideal of chivalry with the Puritan notions of the successful middle class. In it all, the predominance of the aristocracy is obvious, for the main objective of the successful middle class in England has always been alliance with the aristocracy. And let it be said that the attitude, as it has worked, has always possessed a certain mature graciousness. It has imposed itself without conveying an undue sense of domination. It has won allegiance from its inferiors without excessive strain. It has been kindly, it has had a sense of obligation, there has been about it a certain shrewd worldly wisdom which it is impossible not to admire. With something like the grand manner, the English gentleman keeps his



word. He can administer with less bureaucratic irritation than any other type I have known. He can arbitrate commercial or international differences with the same fine equity that he umpires a cricket match. Once he has won, it is difficult for him (as the General Strike and the War made clear) to bear a grudge. He does not like to see the weak and the helpless go unnecessarily to the wall.

But the problem is not the virtues of the type so much as its adequacy for its function; and it is here that grave difficulties begin to arise. For there is no field of activity in the modern world in which the amateur, however benevolent, can retain his function as leader without risking the survival of those who depend upon him. The gentleman's characteristics are a public danger in all matters where quantitative knowledge, unremitting effort, vivid imagination, organized planning are concerned. How can the English gentleman govern India when he starts with the assumption that the Indian is permanently his inferior? How can he measure the strength of Russia in 1914 when Sir George Buchanan, his Ambassador there, does not even think it necessary to learn the language of the people to which he is accredited? How can he prevent the rise of the Labour Party when England is divided, as Disraeli said, into those two nations of rich and poor neither of which has effective acquaintance with the other's life? How can his aristocracy breed great soldiers when a large part of the officer's life in a crack regiment is passed not in professional study, but in the fulfilment of traditional social obligations?

The general theme admits of innumerable illustrations. Here, as I think, its implications can best be shown by tracing its results in three entirely disparate realms. Of these, perhaps industry is the most important, as also the most obvious. It is significant that foreign challenge to English industrial supremacy became effective at the moment when the alliance between the aristocracy and the middle class became an essential feature of English life. The main defects of British enterprise have been exactly those most characteristic of the gentleman. A refusal to consider adequately the wants of the customer; he must buy not the thing he desires but the thing you have to sell. An inadequate attention to technological development; the scientist in industry ought not to have the weight of the practical man. A disbelief in the necessity of large-scale production in the modern world; just as the gentleman would rather lose his income than his uniqueness. A passionate devotion to excessive secrecy both in finance and method of production; so the gentleman must live his own life in his own way without counsel or interference from outside. An incurable and widespread nepotism in appointment; so the gentleman has always been loyal to his relatives without undue regard for their fitness for the posts to which he has called them. This enables you, further, to discount ability and to rely upon a mystic entity called "character," which means, in a gentleman's mouth, the qualities he traditionally possesses himself. A refusal to be absorbed by one's business activities; so Saturday afternoon becomes gradually a holiday which extends from Friday until Monday, with golf

on weekdays, a fortnight at Christmas in Nice, and a conspicuous expenditure which satisfies the craving for social prestige; so the business man comes to think that by adopting the *mores* of the gentleman he may be regarded as free from the taint of trade. If his business becomes a limited company he may invite a couple of needy aristocrats on to the Board of Directors and thus find a side door into society. As he grows more wealthy he may send his son to a public school, there, in all probability, to acquire the habits of mind which the born gentleman possesses by inheritance.

Or, in the second place, we may examine the history of the two traditional political parties in England. From the nineties of last century they were increasingly unable either to devise a programme which should attract the working classes to their ranks, or to select from among proletarian leaders men who should represent them either in the House of Commons or the Cabinet. From the enfranchisement of the urban worker in 1867 until the close of the War, Liberals and Tories between them had never had a score of working-class supporters in the House; to-day neither has one. Mr. John Burns is the only workingman who has ever sat in a Cabinet not distinctively Labour in complexion. The reason of this inelasticity is simply absence of imagination; for many of the older leaders of the Labour Party to-day began as members of the traditional parties, and left them through the experience that there was no effective place in their counsels for men of a working-class origin and outlook. The gentleman, in fact, is prepared to broaden the

basis of power; but he is willing to share the entrance to its inner citadel only with his friends. Neither Liberal nor Tory has known how satisfactorily to define the place of trade-unionism in the state. They have not, as Lord Haldane sorrowfully confessed, appreciated the real importance of a system of national education. They have never really sought to democratize either the army or the navy; the officer class in each has been carefully preserved for those who were fortunate in the choice of their parents. Right down to the close of the War, the diplomatic service was preserved also as what John Bright called the "outdoor relief department" of the British aristocracy. So, too, the legal and episcopal Benches have been rigidly confined to members of the upper middle class and the aristocracy. Even a Labour government finds it difficult to appoint working men and women to the unpaid magistracy.

The political failure of the gentleman, in a word, is that he had not the imagination to perceive that the inevitable accompaniment of political democracy would be the demand for social equality. In any case, he did not believe in it; and even the weak Labour government of 1924 seemed to him something like a convulsion of nature. Just as he could never bring himself to believe that brown men or yellow men might resent white control, so he could not convince himself that poverty might give rise to claims. The rich and the well-born had always governed and they were strongly allied. To him it was intolerable pretension that people like Ramsay MacDonald or Arthur Henderson should claim an equal share in the disposi-



tion of the state. Like Mr. Churchill, they could not believe in Labour's fitness to govern. They were the victors in the battle of life; and it was part of the rules of the game that to the victors should belong the spoils.

The result on English politics is decisive. The gentleman's lack of imagination, the narrowness of his social loyalties, has ranged against him one of the fundamental estates of the realm. Even to-day he does not know why. For him the workers have been misled by wicked agitators whose ideas are probably inspired by Russia. He, the leisured and secure, thinks that the workingman has been pampered into disobedience against his masters by reckless social legislation. He believes that there is too much education abroad, and that the natural loyalty of his inferiors has been unsettled by training above their station. He is incapable of that imaginative realism which admits that this is a new world to which he must adjust himself and his institutions, that every privilege he formerly took as of right he can now attain only by offering proof that it is directly relevant to social welfare. He has no sense that the urge of the common people to expansion is one with which he must come to terms. His heart is in the old world; and because he is utterly unversant with life as it exists for the vast majority, he cannot adjust himself to the new. The gentleman in the presence of modern democracy is as bewildered as Pilate before the spectacle of Christianity.

Another consequence of his influence has peculiar significance in England. As a people, said Bagehot,

the English have a genius for deference; by which, I take it, he meant that they know their betters when they see them. One of the results, certainly, of governance by gentlemen has been a curious humility in the average Englishman which has the most complex ramifications. It affects even the Labour Party, many of whose members assume that the battle of social justice has been won because they dine at the great houses. For them the appearance of a man like Sir Oswald Mosley in the ranks of Labour has a significance of distinction which far outweighs the socialism of Mr. Shaw or Mr. Wells. They assume that a gentleman who throws in his lot with them is entitled to the reward of office. They are anxious themselves to show that they can act and think as gentlemen do. They maintain all the panoply of a court; they appoint only aristocrats to the posts which aristocrats traditionally occupy. A people, in brief, which has been ruled by gentleman is more timid in affirming its own essence than one which has been accustomed to the self-exercise of power. That is why there is so much less servility in France and America than in England. That is why the eminent Englishman of letters is proud to be selected as poet laureate and to accept social recognition from the great families. That is why *The Times* will print a letter, however absurd, from a duke in large type, and one, however important, from the secretary of the Trades Union Congress, in small. That is why, also, the births, marriages and deaths of even the remotest members of the Royal Family cast light and shadow upon every home in England, why the coming of age of a great gentleman

like the Duke of Norfolk, of whose character and intelligence nothing is known, is almost a national event, and the fit subject of leading articles in the press.

Foreign observers, Dibelius, for example, have severely criticized this English snobbery and argued that it shows how complete is the lack in England of a democratic spirit. But this is to take too superficial a view. English snobbery is a collective inferiority complex. It is the result of two hundred years and more of instruction in the thesis that only the gentleman is fit to govern. The distance between the workers and their governors in wealth and refinement and access to distinction has been so vast as to seem to the majority an unbridgeable gulf. And most of the things in which, accordingly, they have sought refuge--their grim Nonconformity, their coarse pleasures, their narrow and confined homes--have done little to develop elasticity of mind or that graceful scepticism which enables man to question where he does not understand. They have been limited in outlook because they have been limited in opportunity. Like most prisoners, they have grown accustomed to their chains; when they are struck off they are bewildered and act as though they were still bound.

The gentleman, in fact, has become a public danger to England because he is now merely a costly, if decorative, appendage to a civilization in which he has no longer a useful function to perform. He has never encouraged himself to use his imagination; and for our problems imaginative leadership is above all essential. He has never disciplined his intellect to organized

analysis; and it is only from that scientific approach that authority can be maintained. His distractions have been so many, his luxuries so great, that he has become concerned rather to enjoy life than to master it. He has been too individualist to welcome organization and too self-confident to welcome ideas. Having been born to power, he does not know how to share it; having inherited unquestioned leadership, he does not know how to act so as to justify its retention. He has been so long unchallenged in his pre-eminence that rivalry tends, by its surprise, to embitter him. He has had so much certitude of temper he is paralysed by the new uncertainties. He has been so much accustomed to command that he feels it unnatural to be called upon to obey. His familiar landmarks are disappearing, and he thinks and acts like a sailor upon an uncharted sea. The prestige of his superiority has gone because the ideal of life he embodied no longer commands universal respect even among those of whom he was once the spoiled favourite. He has lost the basis of his self-esteem because he has no longer either a purpose to maintain or that conviction of its necessity which might give it life.

IV

Yet no one, I believe, will see the passing of the gentleman without a brief annotation of regret. In the period of his apogee, he was a better ruler than any of his possible rivals. I, at least, would rather have been governed by Lord Shaftesbury than Mr. Cobden, by the gentlemen of England than by the Gradgrinds



and Bounderbys of Coketown. There was something picturesque about his thickheadedness, something monumental about his complacency. Compare him with the elegant trifler who was the gentleman of the *ancien régime*, or the rigid disciplinarian whom the German aristocracy provided, and he shines in the comparison. He was often capable of the generous gesture, he was frequently tolerant, there could be about him a fine quixotism it was difficult not to admire. He threw up odd men of genius like Byron and Henry Cavendish, statesmen of public spirit like Lord John Russell and Hartington; he would found great public galleries and establish the British Museum. He was very costly, and, in the mass, depressing and dull. Yet, through it all, he always had the saving grace of a sense of humour.

Nor is it certain that we shall replace him by a more admirable type. The new Renaissance bravo like Mussolini, the new Jesuit writ large like Stalin, those new plutocrats of whom Mr. Barron's *Diary* has been giving us so striking, because so innocent, a picture; are we certain that these represent a change for the better? The leader of the future seems not unlikely to be the remorseless one-idea'd man, who governs us by hewing his way to his goal. He has no time for the open mind. He takes clemency for weakness and difference of opinion for crime. He has a horror of a various civilization and he means by freedom only a stronger kind of chain. Where we would be peaceful, he calls us to the affirmation of power. For the music of idle dreams he offers us the relentless hum of giant machines. The majesty of the

## THE DANGER OF BEING A GENTLEMAN

forest is, for him, the volume of a timber supply, the rush of waters in the river, the source of electric power. The gentleman scourged us with whips. We must beware lest our new masters drive us to our toil with scorpions.

*On the Study of Politics<sup>1</sup>*

## I

THE chair to which I have had the honour to be called is but the second of its kind in this country; for it is only within recent years that the right of political science to be studied as an independent intellectual discipline has been conceded. Oxford, seventeen years ago, was the first university to establish a chair in the subject. London has now followed her example; and signs are not wanting that Cambridge, and some of the modern universities, will shortly follow in the path.<sup>2</sup> I add that it is not unfitting that Oxford should have led the way. Her School of Modern History, to which my own debt is immense, has always been, in some sort, a philosophy teaching by example. In Green and Bosanquet she gave to English political science the makers of a tradition which, even if we dissent from it, must yet be recognized as of primary importance. For not only has that tradition influenced the character of modern legislation; its own inheritance has constantly refreshed our thought with memory of, and inspiration from, our founders in ancient Greece. We need to be reminded of what we may still learn from Aristotle and Plato.

<sup>1</sup> An inaugural lecture delivered at the London School of Economics and Political Science, October 22, 1926.

<sup>2</sup> A Chair of Political Science now exists there; and successful departments of Public Administration have been founded in the Universities of Liverpool and Manchester.

Let us honour Oxford for that primacy. Yet let us also remember that the University of London is the special child of another great tradition in English political science. Our founders were the Philosophic Radicals; and we can claim, with abundant pride, that they changed, and changed for the better, the whole nature of the English State. I like to think that the spirit of this university is set out in that sentence which expressed from Bentham's early youth his faith and practice. "Has a man talents?" he asked,<sup>1</sup> "he owes them to his country in every way in which they can be serviceable." I would remark here that my own task as the occupant of this chair has been made especially difficult because my predecessor has, in his own life and teaching, so finely achieved what Bentham meant by those words. Graham Wallas has followed the prescription of Spinoza in "sedulously disciplining his mind not to ridicule, nor to lament, nor to detest the actions of men, but to understand them"; that has enabled him to make teaching an exercise in the art of friendship. Whatever our differences from Graham Wallas, either as to method or results, we are all of us in part his pupils. And I, at least, am glad to proclaim my veneration for the spirit by which his work has been informed.

Political science concerns itself with the life of men in relation to organized States. We cannot omit from the field of relevant interest whatever may affect that life. We have kinship with the studies of the economist, since the pursuit of wealth is a form of behaviour that

<sup>1</sup> *Works* (ed. Bowring), x, 73.



deeply affects our problems. We are connected with the lawyer; for law, on its formal side, is the body of rules behind which is the authority of government. We are concerned with the official, because the institutions he administers are those through which the purpose of the state primarily seeks its realization. Nor is this all. The results of ethics, of psychology, and of sociology, must obviously affect the conclusions at which we arrive; for whatever may influence, or be practically useful in influencing, the habits of civilized man, is clearly germane to our problems. We need not deny the vastness of our enterprise. It is not a field in which the labour of one man or one generation of men is likely to reap a harvest. We have, indeed, to define our aims, realizing that there is a vital sense in which these aims are liable to change both in time and place; liberty in seventeenth-century England, for example, does not mean what it implies to an American in the twentieth century. We have not only to define aims. We have to discover both the institutions through which those aims are likely to be realized, and the methods by which they are to work. Do we need, for instance, a parliamentary system? Does the latter require, if it is to realize its best results, a highly trained and non-elected civil service behind it to supply the *expertise* in which the general competence of an elected person is almost certain to be deficient? We have, to generalize, two sets of problems before us, those, in the convenient German terminology, of *Staatslehre* and those of *Politik*. We cannot separate them with any precision, for the simple reason that any *Staatslehre*, however independent it may seem, is, in fact, a generalization

from the environment and experience of those who make it. Political science has not the axiomatic quality of mathematics. In its equations the variables are human beings whose uniqueness prevents their reduction to law in the scientific sense of that much-abused word. We deal with tendencies; we can predict upon the basis of experience. But our predictions are limited by the necessity of recognizing that the facts are not within our control. We can influence and attempt and hope; the certainty and precision of the chemist, or even the physiologist, can never be ours.

So much in preface to the basic thesis I am anxious here to lay down. If this is the context and scope of politics, how is it to be most fruitfully studied in order that conclusions of value may be reached? I stand here to plead for the study of politics in the terms of history. To know how our traditions and institutions have been moulded, to grasp the evolution of the forces by which their destiny has been shaped—that, I am anxious to persuade you, is above all the key to their understanding.

I am aware that there are alternative methods, and I hope that I have a proper respect for them. There are those to whom political science is simply a branch of applied psychology. "Let us know," they argue, "the facts of human nature, and the necessary pattern of institutions can be deduced therefrom." But all history is the record of those facts, and if we remain ignorant of it, we do not know our essential materials. A list of impulses and emotions does not explain them. It is only when we have them in their formidable complexity, when we see them at work, and attempt to

value their results, that they begin to have political meaning. An *a priori* politics of any kind is bound to break down simply because we never start with a clean slate. A psychological theory of politics which seeks for an original human nature as the test of institutions fails us for a simple reason. Upon the foundations of inherited impulse, there is that vast superstructure the social heritage, which largely determines its working. Therein is the whole of its colour and connotation; and it is merely mysterious until we know the nature of its development. What it is and why it is, it is by reason of its history. Its becoming is the clue to its being, and it is from that becoming that we must wrest its secret.

My plea, therefore, is that, to have value, the study of politics must be an effort to codify the results of experience in the history of states. Our conclusions must remain uncertain save as they are built upon historical analysis. The reason is a simple one. We are the consequences of traditions and institutions we did not make and can only partially alter. The foundations and possibilities of our conduct are determined for us by our past. We are, so to say, terms in an infinite series, each one of which is a partial clue to the point we seek to understand. The thinkers of Greece and Rome, for instance, represented a way of life the incidence of which upon ourselves is the more profound the more we study its results. The medieval world, again, will seem less remote from us as we begin to catch the purport of its meaning; certainly our own day has special cause to insist upon a Europe which was in some sort a single commonwealth united by one of the strongest ties that bind men together. The

Reformation represents the consequence of the failure of the *Respublica Christiana*; and the energy it released was so gigantic that its principles have ever since influenced every other department of human life. The French Revolution, for example, is, in an important sense, one chapter in its history; and the tradition emphasized in 1789 became, as it met new material conditions, the communism of Marx and Lenin. The present is the child of the past, and we are the parents of the future. It is not inevitable or predictable. But it is determined in the sense that the limitations of effort, and the avenues of profitable action, are set by our willingness to understand our own day in terms of the events by which it has been most largely made.

Obviously, I am simplifying to excess. I shall be satisfied if I can convince you that nothing in our field of investigation is capable of being rightly understood save as it is illustrated by the process of its development. To know what is permanent in our own ideals and desires we must know what they have meant in the experience of men. Man, if I may invert the famous aphorism of Rousseau, is born everywhere in chains, and he becomes free only upon the grim condition of self-knowledge. A true politics, in other words, is above all a philosophy of history. And I would ask you to observe that all great thinkers who have seriously influenced the actions of men, have done so because their work was precisely an effort to this end. Hobbes sought from history the specific against disorder; Locke the facts which justify the right of rebellion; Rousseau inquired how humble men might be free who felt grievously the burden of social bondage. Bentham



seems to have rejected history; yet his philosophy is, above all things, a system made by repudiating with energy the abuses of his time. Marx challenged the institutions of capitalist society in terms of an ideal wrought from a brilliant, if partial, scrutiny of its processes. It is, in fact, the habit of political philosophers to transform their reading of history into universal dogma. Much of it, naturally, is narrow and incomplete, and unworthy to survive the special circumstances from which it takes its origin. Yet something, if the reading be sufficiently profound, survives to become part of a common stock of ideas which men use, if only half-consciously, as their chart in sailing over a but partially known sea to a harbour which ever recedes as they advance.

My own main interest is in the history of political ideas, the attempt to gather, in what detail one may, what men have thought about the state. If I have one ambition above others it is to make this School a great centre for the study of this aspect of political science. For the study of ideas in their historical context is a source of political illumination as valuable as any that lies to our hand. Not only does it serve to correct, more truly than any other discipline, that tendency to over-estimate the originality and significance of our own ideas. It prevents, as no other study can, that vicious habit of making the immediate need the eternal good, which is the source of some of the worst evils in contemporary politics; for we seek, wherever possible, to confound the principles we adopt with the necessary foundations of society. And by the study of ideas it becomes, I think, possible to separate from the facts of

history the abstract truth that interpenetrates them. It is, rightly used, the supreme source of general ideas of a character capable of compelling right action. For to understand why men have held particular political opinions is to compel the scrutiny of one's own faith with an inescapable knowledge that its value is limited. That knowledge, I believe, confers a habit of tolerance. We learn to distinguish between principle and party; we come to see that the more we immerse ourselves in the habits of party, the less our principles are true to the ends they seek to serve.

In all this, of course, there is implied a method of studying the history of political ideas about which I shall have something to say in a moment. But I should like to insist upon the moral value of this discipline by reference to that habit of tolerance upon which I have just laid emphasis. From the history of political ideas one learns nothing so definitely as the great fact that, as Leslie Stephen once put it, "the spread of an error is part of a world-wide process by which we stumble into mere approximations into truth." More than this. One learns also that any error of wide circulation may possibly contain some great element of truth, and will certainly contain an important index to the aspirations of men. Now in the construction of any adequate political philosophy, it is elementary that the aspirations of men are important. To satisfy demand on the largest scale is the statesman's business; and he will only know what demand he has to satisfy according as he discovers what those aspirations are. The lesson we at least are taught is to be charitable to ideas we do not share, to understand and not to suppress them. For we

learn, first of all, that in the history of ideas suppression has been rarely successful, and, secondly, that the price we pay for that suppression is always moral and intellectual loss. Any one who studies the history of toleration in religion can verify these conclusions for himself. I emphasize them here because it seems not unlikely that the modern state is seeking the terms of an orthodoxy not less rigid than that sought by the Churches at the period when they controlled by force the minds of men. And unless we are as vigilant here about the importance of receptivity even of opinions we believe to be grievously wrong, we shall be guilty of the same mistakes, even of the same crimes, as those who persecuted in the name of truths which the better judgement of mankind has declared to be without foundation.

There is implied here, I have said, a method for studying the history of ideas. It is the simple one of studying the opinion and those who expressed it in the light of their special environment. Nothing is more useless, because nothing is less revealing, than to separate the political philosophy of any thinker from the circumstances in which it was born. Rousseau is only intelligible, to take a supreme example, in the context of eighteenth-century France. The unity of his ideas is to be found in a system of personal experience set by the habits and institutions of the *ancien régime*. Every great thinker is in part the autobiography of his age. His influence springs from the fact that he expressed, in a peculiarly magistral way, some significant portion of its hopes and fears. That is the unstated major premiss we have always to discover in his philosophy

if we would seek to explain it. We must avoid, that is, the fatal habit of making out a list of principles, bare and objective, as the thinker's contribution and omitting all that made his principles alive and influential. To say, to take Rousseau again, that Rousseau based the State upon contract is true and yet useless; but to say that Rousseau based the state upon contract that he might emphasize the importance of humble men in an age which treated them as unimportant is a very different matter. The little minor of circumstances, as Burke used to say, plays a great part in the actual battle.

I would draw your attention, also, to another aspect of this argument. Political philosophy is never separable from the general body of ideas in a generation. The rediscovery of ancient Greece had enormous influence on the political systems of the sixteenth century; the history of classical scholarship is a chapter in the history of political philosophy. So, too, in the seventeenth century the form of political speculation is quite largely determined by attraction to, and repulsion from, Cartesianism in its widest sense; and the method of the French *philosophes* was set, to a degree we have insufficiently examined, by the achievement of Newton in physics. And if, in another aspect of the eighteenth century, we are a little inclined to smile at the noble savage of Rousseau and his contemporaries, an examination of some such collection of voyages as those of Tavernier or Thévenot will throw much light on what might otherwise seem unprofitable apriorism.<sup>1</sup> The

<sup>1</sup> Cf. the very interesting essay of Geoffroy Atkinson, *Les Relations des Voyages du XVII<sup>e</sup> Siècle et l'Évolution des Idées* (Paris, 1925).



influence of Darwin on nineteenth-century political thought, both for good and evil, is, of course, obvious; and I would hazard the judgement that our own day is likely to be equally affected by the amazing achievements of modern physics. We need, in a word, so to write the history of political ideas that they fall naturally into their place as the expression of one aspect of a process of thought that is not neatly divisible into two separate categories. We must seek to project our narrative on to a plane where the relation of a whole to the parts is capable of being seized in its full significance.

Let us remember, also, not to neglect the lesson of the literature of a period. It is easy for us, the contemporaries of Mr. Shaw and Mr. Wells, to see that the play and the novel are essays in politics; and a great social satirist like Mr. Siegfried Sassoon reminds us that it is not only in the age of Juvenal that we must go to the poets for information about social philosophy. Yet in the most widely-read history of political ideas I find no reference to Dickens or Disraeli, to Byron or Shelley. The great men of our subject, of course, knew better; and Leslie Stephen's *English Utilitarians* is a superb example of the way in which the whole nature of an epoch can be set out in terms of its thinkers. Nor must we neglect the historians. The thing that they do is always, even if indirectly, an index to what the age is wanting. The difference between the way in which history was written in the eighteenth century and the way in which it is written by our own age is not merely a difference of equipment and technique; it is also a difference of social outlook. The production of books like those of Mr. and Mrs. Hammond and Mr. Tawney,

the criticism to which they have been subjected, is a fact of precious import to us. But I do not need to labour this point to any who know Acton's famous essay on German historians or the extremely suggestive prelude to Vinogradoff's *Villainage in England*.

I would, however, emphasize one point in the study, from our angle, of historiography. The past is never dead, because it is capable of re-creation at each moment of time. And the way in which that re-creation takes place can hardly be studied too closely by the historian of ideas. For, if I interpret it aright, historical writing in the future will be wider in character than in the past. "It will elevate itself," to quote a great German historian,<sup>1</sup> "to freer movement and contact with the great forces of political life and culture, without renouncing the precious traditions of its method, and must plunge into philosophy and politics . . . thus alone can it develop its intimate essence and be both universal and national." The new history, if I am not mistaken, is more likely to be based upon a conscious scheme of social values than the old. And this is likely to mean an increased sense of what may be termed the immortality of history. The past is being re-made to serve the needs of a new time. The historian interprets afresh the meaning he can discover in the record, that its lessons for ourselves may be made evident. The spirit, as Croce says, carries with it all of its history that coincides with itself. Wilamowitz, Zimmern, Gilbert Murray, give us a new Greece, Max Weber and Tröltsch give us a new Reformation Christianity; a history, in each case, that is pragmatic in the sense of

<sup>1</sup> Meinecke, *Weltbürgertum und Nationalstaat* (Berlin, 1911), p. vii.

seeking to satisfy new demands never before made, and never capable of being made, upon the documentary material. Compare the treatment of Byzantium in Gibbon with its treatment by such masters as Diehl and Baynes. One has the sense, not merely of a new body of evidence, but of a new spirit informing that evidence. And that re-creation of the past is the effort of our time to find the significance of its problems in the epochs out of which they have arisen. The past therein is made the present; and to know the historiography of a period is to know with some certainty its meaning and desires.

I do not want to leave upon you the impression that politics should be studied historically merely for the sake of the history thereby revealed. Our end is to know the causes of things, to attain a perspective whereby the philosophies we adopt may be the richer and truer in substance. I say advisedly the philosophies; the plural noun means that we do not ask in this university the acceptance of any particular creed. My object as the occupant of this chair is not to create a body of disciples who shall go forth to preach the particular and peculiar doctrines I happen to hold. It is rather that the student shall learn the method of testing his own faith against the only solid criterion we know—the experience of mankind. That does not, of course, mean that in the exposition of political philosophy it is one's business to pretend to impartiality. In any case that is impossible; for in the merest selection of material to be considered there is already implied a judgement which reflects, however unconsciously, the inevitable bias that each of us will bring. The teacher's function, as I conceive it,

is less to avoid his bias than consciously to assert its presence and to warn his hearers against it; above all, to be open-minded about the difficulties it involves and honest in his attempt to meet them. For the greatest thing he can, after all, teach is the lesson of conscious sincerity. More truth is discovered along that road than can be found on any other.

May I illustrate what I mean by an example drawn from my own particular studies? To me, the central problem of politics is the problem of authority and freedom. I believe that the social conscience of the citizen is the surest guide to the conduct he should display in the face of events. That means, of course, the contingency of disobedience, the possibility that the individual should refuse submission to the powers that be where he is sincerely convinced that he can do no other. The moral obligation to resist, in other words, seems to me the root of social well-being. Now this is, frankly, at once a denial of the sovereignty of the state, and an insistence that power is only valid by winning from those subject to it their free consent to the authority it seeks to exercise. My business, as I conceive it, is not to avoid the expression of this conviction, but frankly to explain why it seems to me a more valid outlook than alternative philosophies, why, also, the difficulties it involves, grave as they are, do not seem to me at any point insuperable. As a doctrine, of course, it involves momentous consequences. Had I the time, I should like to show how it makes the state not the creator of rights so much as their creature, and judges its activities by the degree to which it protects the rights from which it derives the only justification it can have for making



us obey it. It would, further, be interesting to show how, in our own time, a crisis in the modern state has arisen because the rights protected by it are interpreted too narrowly by the holders of power. I should seek to show, did time permit, how that movement for the equalization of privilege, which is the inevitable outcome of Protestantism, has passed from the spheres of politics and religion to that of economic life. The movement, of course, is one towards greater freedom, in the sense of giving to the average man far wider opportunities of self-realization than he has been able, so far, to secure. It is the end of *laissez-faire* in economic arrangements, the introduction therein of a conscious control of the means of living by the organized community. Put briefly, it is the movement from the authoritarian to the functional state.

Clearly, all this is matter of profound and passionate controversy. I do not think it is, or ought to be, avoided. I know no place where, as I believe, social problems can be better or more fitly studied than within the walls of a university. We can introduce there, as we cannot in the conflicts of the market-place, the doubts and hesitations, the quantitative estimates, the limited certainties, that necessarily appertain to all solutions. I am tempted to argue that while statesmen, who have to convince vast multitudes, must necessarily live by purveying undistributed middles, the student in an academic atmosphere has a unique opportunity of examining creeds and hypotheses in entire indifference to the results of his examination. He can take questions like the right of private property, the limits of toleration, the sovereignty of the state, and examine them as a

zoologist examines his specimens in a laboratory. And he must teach what he believes to be the results of his inquiry so long as he is careful to base those results upon the widest induction that is open to him, and with an insistence upon the large margin of probable error which attaches to all social theorems.

This view drives us back at once to my original hypothesis about method. For the largest induction which is open to the student of politics is one to be made only upon the basis of historical investigation. Take a single instance. Suppose that he believes in freedom of speech. What better way of proof lies open to him than the investigation of the painful record to the acquisition of such freedom as we have? He would show how Catholic persecuted Calvinist, how Calvinist persecuted Socinian, how Socinian persecuted Atheist, all in the name of supposed truths which did not win one genuine convert by being enforced at the point of the sword. He could describe how the heresies of one generation become the orthodoxies of the next. He could explain how, on the record of history, the minds of men are so little receptive of novelty, as to make it urgent that ideas be welcomed because they are ideas, and be left to survive or perish by competition among themselves. He could take shibboleths like the famous phrase "liberty but not licence," and show how the persecutor always means by the latter the idea that causes him acute discomfort, and against which he cannot make the headway his own clear possession of ultimate truth suggests as desirable. The controversy is admirably summarized in the dispute between Bayle and Jurieu about the limits of toleration. Both, as

Protestants, were horrified at the Revocation of the Edict of Nantes, and the fiendish cruelties which accompanied it; but while Bayle drew therefrom the inference that all religions should be tolerated, Jurieu argued that only Calvinists had a right to be free from oppression. For Calvinism was true; and if Catholics did not suffer for their faith, it would be assumed that things untrue were as pleasing to God as things that are true, which is absurd. I will not trouble you with Bayle's magnificent reply. But you can see how the historic event may be used to illuminate Bagehot's sage remark that even if "the ideas of the very wisest were by miracle to be fixed on the race, the certain result would be to stereotype monstrous error."<sup>1</sup> ✓

I turn to a very different aspect of politics. It is one to which I am anxious to draw your attention for several reasons, not least because its investigation has been a special feature of this School. One of the great changes we are witnessing in the present century is what may be termed the emergence of the positive state. Governments to-day are compelled by the necessity of things to undertake functions qualitatively different from those assumed in any previous age. Where earlier states were typified by the policeman, the modern state is typified by the administrator. The understanding of his art is now central to the understanding of political science; and with its recognition as important there have come into view a whole range of problems unconsidered by the classical writers. You will search Bagehot in vain for a discussion of the civil service as an integral part of the British Constitution. You will

<sup>1</sup> *Collected Works*, vol. vi, p. 225.

not find in Dicey any illustration of that *droit administratif* which is now one of its permanent features. Yet upon the work of the administrator to-day depends the success or failure of the institutions under which we live.

There are few fields of politics in which so much research and so much inventiveness are necessary. Administrators, as a rule, have the natural secrecy about their art which comes from men who live by the exercise of a mystery; and, in England especially, the sacred doctrine of ministerial responsibility operates to enforce upon them a somewhat unnatural silence. I believe myself that the investigation of their function, and its reduction to a body of general principles, is one of the most necessary tasks before us. It is extraordinarily difficult and delicate, partly because so little of the ground has been broken, and partly because administrators are themselves busy men who have rarely the time to translate their experience into rules. Yet we must, if our institutions are to work satisfactorily, learn the principles which underlie such matters as delegated legislation, the relation of consultative bodies to departmental experts, the relations between executive discretion and judicial control, the right to form associations, and, inferentially, to strike, in public departments, the appointment of officials. Luckily there has come into being an important body, the Institute of Public Administration, which is seeking to organize scientifically the experience of public servants; and there is no omen I more gladly welcome than its desire to have close relations with the University of London. So much of political philosophy depends upon the power



to indicate the necessary institutions for its purposes that it is urgent to have with us the men who operate those institutions. For it is a commonplace that those who execute measures are they who in fact control them. If the real rulers of a country are, as a great American lawyer said, undiscoverable, I believe myself that to know its civil service is to come fairly near to the heart of the mystery.

I doubt whether any of the social sciences offer such prospects to the student as the field it is our task to cultivate. So little has already been accomplished, so much remains to be done! Yet it would be wrong on my part not to emphasize the difficulties of the task. The collection of materials is arduous; the provision of texts is by no means satisfactory; and there are whole epochs in which little is known save the fact of our ignorance about their essential features. Let me venture here upon some illustrations. Any one who desires to study what may be called the natural history of the House of Commons, to assess, in the light of its working, the things that have made it a successful representative body, will be surprised to discover how little has been done to cut a path through the jungle. Gleams of light, indeed, there are, as in Professor Notestein's quite admirable study of the way in which the initiative in law-making passed from the Crown to the lower chamber.<sup>1</sup> But if we inquire into matters like the frequency of re-election, the relationship between economic change and parliamentary representation, the period of time which elapsed between

<sup>1</sup> *The Winning of the Initiative by the House of Commons in the Seventeenth Century*, Oxford University Press, 1925.

election to the House and membership of the Cabinet, we find that there is practically no knowledge available. Yet it is obvious enough that in the place of large-sounding generalizations that have never been tested we badly require quantitative answers to those problems, the proper solution of which can alone make possible the understanding of representative government.

Or, again, take the question of texts in the history of political philosophy. If one thing can be postulated of its study, it is that the great men of each epoch do not stand alone, but are, so to say, simply the peaks of a gradually ascending curve, each item of which it is important to know. Every one knows the *Utopia* of Sir Thomas More; few realize that what influenced his own generation were his polemical works, and that most of these can be read only in a public library if one is not a rich man. Gierke has made the work of Althusius a topic of common discussion. Most of us take his word for Althusius's importance without having read him, since only half-a-dozen copies of the *Politica* are in existence; and I hazard the judgement that acquaintance with the book itself would make many who now echo Gierke's eulogy feel that the book was far less influential than he suggested.<sup>1</sup> There are, moreover, thinkers of quite first-rate ability, of whom the English Benedictine Roger Widdrington is an example, the rarity of whose books has meant their almost complete suppression in literature. There are other books of seminal importance, Jurieu's *Lettres Pastorales* is a good example,

<sup>1</sup> It was reprinted under the editorship of Professor C. J. Friedrich in 1932, with an illuminating introduction.

which ought to be as accessible to the student as Locke or Montesquieu; yet they are available only to the collector who can afford to pay a high price. I do earnestly plead, above all with the presses of our great universities, for the provision of necessary texts for scholar and student. Althusius, Widdrington, Jurieu, Ponet,<sup>1</sup> are surely not less worthy of careful editing than the remoter writers of the Latin silver age. Yet the problem of obtaining attention for them has, so far, proved almost insoluble. Here, let us hope, the work that has been done by Mr. Previté-Orton on Marsiglio of Padua may be the beginning of a better time. But we want a series as helpful to the study of English and French ideas as the *Monumenta* has been to the study of German ideas.

Whole epochs also, I have said, remain unknown. That is not an emphasis by way of paradox. Despite the immense body of work that has been done on the Reformation, we know less of Tudor political ideas than of any comparable epoch in English, indeed, in European, history. I need not stress the importance of the period; I would emphasize my conviction that there awaits the historian of this aspect of it revelations as important, and discoveries as exciting, as it has ever fallen to the scholar to make. We have, for instance, in this age a group of sceptics who are no whit less interesting even than the great Montaigne and his disciples. Again, it is surprising, in view of its importance, how little we really know of the eighteenth century in France. The great men, Voltaire, Montesquieu, Rousseau, Condorcet, have been studied and discussed almost to

<sup>1</sup> His *Treatise of Politique Power* has now been reprinted by the Columbia University Press.

exhaustion; but we do not yet know them in perspective simply because their roots and filiations have not been studied. I think, for example, of great Conservative writers like Linguet, whose *Théorie des Lois Civiles* is a fascinating combination of Burke and Marx. Yet his place in the great succession, despite what attention he has attracted, remains undetermined. Something in recent years has been done for Holbach; but Fréron, Moreau, Lambert, to take names merely at random, still await critical treatment. And the writer, to throw out a hint, who studies French constitutionalism under the last half-century of the *ancien régime* will find that he can throw a totally unexpected light upon the character of the Revolution.

I am anxious, further, that the study, from our angle, of institutions should not be neglected. Here let me confine my observations to England and note certain obvious lacunae. The three outstanding institutions of our own day still await adequate treatment. We have no history, at least worth the name, of the Cabinet; we have none upon local government in the nineteenth century; we have no satisfactory treatment of the civil service. Their critical study in the light of history would, I venture to believe, illuminate the whole field of political philosophy. To those who have read the great work of Mr. and Mrs. Webb upon Local Government before the Municipal Corporations Act, this emphasis will be the merest commonplace. Yet I am not convinced that the lesson has been widely learned. For any one who studies either the history of our political life or our political thinking in the nineteenth century can hardly fail to be struck by the degree to



which it remains narrowly biographical in character. I would not be taken as denying the importance of leadership in politics; but I would still dare to believe that it is in the study of the institution as idea and instrument that the most fruit is to be gathered.

One other grave need should, I think, be noted. The sister social sciences have all of them the media of discussion and publication; we have been the Cinderella of the family. The economists have their great journal, the Political Economy Club, their section at the British Association. The historians have a Review which is known wherever scholarship is cherished, and a number of societies which can even induce Prime Ministers to offer them their reflections. The sociologists have their journal and a club which, it is pleasant to reflect, this School has done much to foster. Only political science remains neglected. I am not unmindful of the gallant effort made before the War by my friend Professor Adams to found a journal; but it did not survive the difficulties of the post-war epoch. France, America, Germany, and now Canada, have all of them the full instruments of organized research at their disposal. Cannot we emulate their example and that, as I have shown, of kindred studies? Could we not persuade, let us say, the British Association to experiment with our subject and so centralize the interest in its discussion we so sorely need? Cannot we political scientists do what the economists have done and dine together? Post-prandial fellowship in English history has not seldom been the parent of intellectual discovery.

To some of you, perhaps, I may appear to be too ambitious for my subject. Yet I would urge two pleas

in mitigation. The thirst for conquest in the realm of intelligence is not the least noble of human aims. To make a chart of this great hinterland of knowledge is, even if it be but partial, still something won for the amelioration of man's lot. And it is particularly important in our own time that the effort should be made. Our civilization is being tested by a strain as great as ever led to the destruction of past empires. Its margins are haunted by the conflict of races, the struggle of classes, the clash of colour. If we are in the end to survive, we must, above all things, bend our energies to the discovery of knowledge. There is no other road to salvation. We are not less destined than our forefathers to earn our livelihood in the sweat of our brow. We have, do not let us forget, the overwhelming task of giving to the common man that access to his inheritance of which he has hitherto been deprived. He tests our effort not by the thought and pain that have gone into its making so much as by the results it achieves. He remembers not its fragility, but its power. We have to discover both what he wants and how, with justice and wisdom, we may meet those wants. Only as we possess that knowledge can we await his judgement with confidence.

I do not, believe me, minimize the difficulty of the task. I realize full well how little we shall ever know, compared to what we desire to understand. I am, I hope, only too dismally aware to how few of us it will be given to account our achievement either significant or rare. Yet I have some measure of confidence. The highest of all joys, after all, perhaps because it is the most difficult, is the effort to show the connexion

between the facts one studies and the structure of the universe. I quoted Spinoza earlier in this lecture; and I am reminded here of another phrase of his, not less noble—"omnia praeclara tam difficilia quam rara sunt." The very difficulty of our problems only makes the pursuit more ardent and the results more precious.

That pursuit, moreover, is conducted here in an atmosphere peculiarly suitable to the task. This School is old enough to have a tradition and young enough to have avoided dogmas. It works in an atmosphere that is eager only that inquiry should be made, and regardless of, even if it be interested in, the conclusions of the inquiry. As a laboratory of investigation it is very happily placed. The libraries are at our elbow; the great departments of state, the House of Commons, the government of London, can be observed and analysed at first hand. May I add that I, particularly, am fortunate in a body of colleagues who make the work of teaching and research less a labour than a privilege? In the years that lie ahead we shall seek additions to knowledge as worthy as we can make them of the trust that has been confided to us. We shall do that, not with the thought or hope of impressing upon our students any special doctrines or convictions, but, as we desire, with the power to live their lives more fully by reason of the ferment created in them. It is our ambition to inspire in them a silent devotion to the great subject we serve. We are still young enough to believe that the service of thought is the noblest calling to which a man can devote himself. We ask to be judged by the measure of our effort to make others think likewise.



## CHAPTER III

### *Law and Justice in Soviet Russia*

#### I

THE legal system of Soviet Russia is still a tradition in the making; and it is therefore interesting to seek to understand its implications at a time when they have not yet attained fixity of form. It is, moreover, an event shaped by the profoundest historical forces that have affected any people since the French Revolution. The State has been based upon new legal postulates, which correspond, in the purpose they seek to fulfil, with a change in class-relations hitherto unknown in its intensity to the human race. Broadly, it may be said that, in all previous political systems, the main purpose of the law has been the protection of those class-relations which result from the private ownership of the means of production; and, broadly also, it may be said that the main purpose of the law in Soviet Russia is the protection of those social relationships which develop in a community where the instruments of production are publicly owned. It is obvious to any observer that nothing in the Russian legal system has yet passed beyond the experimental stage. A new society is still seeking the forms appropriate to its substance. But what has emerged is already sufficiently concrete and significant to make comparison with our own system worth analysis and comment.

I do not propose to discuss here the anatomy of the Russian system. That has already been done admirably in concise form by my friend, Mr. D. N. Pritt,<sup>1</sup> and at greater length in such treatises as those of Dr. Zelitch.<sup>2</sup> I am rather concerned here to select out of the great experience the new system offers, certain salient principles which seem to me worthy of discussion. I shall discuss the organization of the Bar; the working of the Courts, with special reference to the People's Courts—perhaps the most significant institutional experiment in the new Russia; I shall then discuss the working of the Procurator's Office; and this leads naturally to a consideration of the interrelations between the work of the judiciary and legal research in its varied phases. Finally, I want to draw your attention to the treatment of the criminal in Russia and to some of the vistas opened up by its penal experience in recent years. You will realize, of course, that such a treatment as I can attempt is necessarily limited and superficial. So vast an experiment, even within the legal sphere, requires far more prolonged study than a month's examination makes possible. If I succeed in suggesting to you that there is a field of inquiry at least as worthy of study as the habits of a primitive Polynesian tribe or the finances of the medieval exchequer, I shall be amply content. For I must say at once, without further preamble that, the army and the trade unions apart, there is no aspect of Russian life more significant for ourselves than its legal aspect. Compared with our

<sup>1</sup> *Twelve Studies in Soviet Russia* (1933), pp. 147–76.

<sup>2</sup> *The Soviet Administration of Criminal Law* (1928).

own, it lacks settled form, dignity, procedural rigour. But I believe that there are definitely many features in which it brings law more substantially into relation with justice than anything the Common Law system has so far been able to attain.

## II

We have a legal profession divided into two branches; and access to either depends very largely on the accident of financial circumstances. In either aspect of the profession, the prizes, though lucrative, are few; and I think it is not beyond the mark to say that the average practitioner is unlikely to make an income of much more than two hundred pounds a year. Entrance into the profession is controlled by a number of close corporations; and I think most people would agree that the standard of competence demanded either of the budding solicitor or the budding advocate is not high. Further, outside Scotland, the legal profession has no direct connection with the teaching of law in the universities; and, in any wholesale way, neither branch of it, like most professions, concerns itself with research into, or improvement of, the material with which it is concerned. Each side of the profession is highly individualistic in character; and each is mainly concerned—the Poor Person's Rules apart—in the regulations it lays down rather to protect its corporate interests as a trade union than to assist the public in its search for justice. This is, indeed, more true of the barrister than of the solicitor who has, in recent years, shown signs of a greater concern for

## LAW AND JUSTICE IN SOVIET RUSSIA

the public interest. But, broadly speaking, I do not think it would be unfair to say that in the last hundred years any serious impetus to law reform in Great Britain has come from outside, and not inside, the profession.

The whole Russian situation in this respect is completely different. The profession is unified; and the professional lawyer plays a much smaller rôle than we are accustomed to in this country. This results from a number of causes. Partly, Russian procedure, particularly in relation to the law of evidence, is much more simple and much less technical; partly, again, there is an almost complete absence of case-law in Russia, with the consequence that precedent occupies a very small place; partly, further, in all criminal cases the work of investigation before the case comes to Court is much more far-reaching than with us; and, finally, the unimportance of wealth in the context of law gives no advantage to the rich over the poor in either the employment of the advocate or the ability to appeal.

The organization, accordingly, looks strange to an English observer. He sees in each jurisdiction of the union a "collegium" of lawyers. To this may be attached any one who has the qualifications demanded of a lawyer. He may have served for two years in the judiciary in a position not lower than that of an investigator. He may have studied for two years at one of the many institutes of Soviet Law—a combination of a law school and a legal research institute. He may have taken evening classes in law at a university or elsewhere in his spare time and then have passed an examination by the "collegium." These are the usual

methods of entry. And the curriculum, which combines a working knowledge of formal law with the study of economics, political science, and sociology, does at least assure that a person admitted to the practice of law sees it not as a body of cases to be known, or rules to be learned, but as a living system of principles directly related to the social life about him. My sense was that though the standards of entrance still leave much to be desired—that is true with ourselves where admission to the Bar is much more a social function than an intellectual discipline—as the system develops it ought, by its nature, to produce men interested in making the law a concrete instrument of social justice. I do not think this can be said of legal education in Great Britain.

Once the lawyer is admitted to his "collegium," his services may be selected by any litigant, or, as is more usual, he will be appointed to assist a litigant by the consultation bureau to which a person needing legal advice normally applies. The litigant pays fees in proportion to his means. But the fees do not go to the lawyer; they are paid to the collegium, which, in turn, remunerates its members month by month in accordance with its estimate of the quality of their service. So far as I could ascertain, the average lawyer is paid about as much as a well-skilled workman. There is, of course, no differentiation between the sexes in the collegium; and the tendency is for the number of women lawyers to increase.

Professional discipline is in the hands of the praesidium of the college; though there is an appeal from its decisions to the department of discipline in the



appropriate Regional Court. There may be disqualification, or suspension for a period; there may even be prosecution in grave cases. The paramount considerations are duty to the client and a rigid adherence to the abstention from private practice in our sense of the term. The *esprit de corps* of the collegium seems to produce all the energy appropriate to the prosecution of a client's case; and I both saw in Court, and heard from lawyers themselves, that they did not feel inhibited even in the defence of persons accused of counter-revolutionary activity. I add that at least three-quarters of the profession do not belong to the Communist Party, and that there is no tendency for clients to seek the aid of those lawyers who do.

So far as I could judge from discussion, the system works well. Almost all the lawyers I met who wanted to go back to a system where there was an individual relation between lawyer and client were men of the *ancien régime*; and I thought it clear that the collegiate method produced in the average lawyer a sense of the public import of his work of high value. I was impressed by the number of lawyers who maintain a continuous connection with legal research, particularly on what may be called its "clinical" side; and by the growing tendency of the profession to draw its recruits from all strata in the population. Two lawyers I met were reformed criminals from the famous OGPU settlement at Bolshevo; their quality was remarkable. From discussion with factory workers I thought it was clear that the widespread sense common with us of the lawyer as the enemy of progress, and, particularly, of the humble man, had largely disappeared. And the

work of the Consultation Bureaux, in this regard, was beyond praise. They have established a relation of mutual confidence between the lawyer and the general population which, within my own experience, is equalled only by the remarkable work accomplished by Judge Julian W. Mack, now of the Federal Circuit Court of Appeals, in the days when he presided over the First Children's Court in Chicago.

One other thing about the Russian lawyer I may perhaps emphasize. He has a profound interest in the legal experience of other countries. Nowhere have I met a more eager desire to measure his aims and performance in terms of those in operation elsewhere than in Russia. Judges and advocates alike asked me endless questions about the working of English Law, with an insight into its habits which very few English lawyers possess into other systems. We are accustomed to assume that such knowledge is not helpful. The paucity of English books on foreign systems and their working, the pretty complete absence of comparative legal statistics, the almost complete silence of the universities in the field of comparative law are illuminating in this regard. The contrary is true of Russia; and since I myself believe that much of the improvement of law depends upon comparative analysis of national experiences, I note this difference as a thing of significance which deserves remark.

### III

The judicial system in the constituent republics of the U.S.S.R. is usually a three-or-four-tier-system. At



the base are the People's Courts, with a jurisdiction both civil and criminal, which is broadly similar to that of the county and police courts in England. Above them are the regional or Provincial Courts. These deal with all cases of first instance beyond the competence of the People's Courts; they review the work of the Courts below; they supervise all judicial institutions in the province; and the full bench meets to decide any points of law which may be referred to it by a division of the Court. Above the provincial courts is the Supreme Court, which divides its work into three branches. The first, working through the full plenum, decides points of law referred to it. The second gives decisions on appeal from the Court below. The third deals with original jurisdiction involving such persons as judges, or a subject matter of special significance. I should add that there are also special Children's Courts, under the Ministry of Education; and that as a rule, disputes between government departments are settled by special arbitration tribunals.

Soviet judges are of two kinds--the professional judge and the lay judge. The former, as in France and most Continental countries, is a professional civil servant. In the People's Court he is elected for a year either by the Provincial Executive Committee, or, as in the larger cities, by the local soviet from candidates who are nominated either by the Provincial Court or by the Ministry of Justice; and he can be recalled at any time with the Ministry's approval. The judges of the Provincial Court are elected in a similar way, and are similarly subject to recall. In the Supreme Court, the president, the vice-president, and the heads of the

different departments are appointed directly by the Central Executive Committee; while the other judges are also appointed by it, but on the nomination of the Ministry of Justice. In the Supreme Court of the U.S.S.R. the judges are appointed directly by the Central Executive Committee of the Union. Qualification for appointment is the possession of the franchise, on the one hand, and previous service, of varying periods, in different branches of the judiciary.

As a rule, the professional judge (the Supreme Court of the U.S.S.R. apart) sits with two lay judges as his colleagues; and there is, of course, no jury. He can be overruled by his colleagues, both on points of law and of fact; and he is, of course, subject to recall. How then, are the lay judges chosen? In the People's Courts from lists of candidates elected by factories, village soviets and similar bodies, and chosen therefrom by a special commission on which there sit a people's judge, an assistant-procurator, and a member of the county executive committee. In the Provincial Court, the lay judge must have had two years' experience in certain State or professional organizations; and he is selected from among such qualified persons again by a special commission consisting of two judges of the Provincial Court, one member of the provincial procurator's office and three delegates from the local soviet or trade unions. In this case, however, the provincial executive committee must confirm all appointments, and there is no appeal from its decision to reject. The lay judges of the Supreme Court, both in the constituent republics and in the U.S.S.R., are

selected from special lists by the praesidium of the central executive committees of each, respectively.

What kind of a judiciary does this system provide? Such professional judges as I met were, almost without exception, impressive. They were all products of the Revolution. One had been a baker's assistant before 1917; one had been a metal worker; a third had worked in a shoe factory. All of them were ardent communists; and all of them had been reappointed to office year after year, for periods varying from seven to fourteen years. It was impossible to doubt their enthusiasm for their work, or their sense of its direct relationship to the social conditions about them. With one or two exceptions, I have never met English judges whose legal competence was similarly permeated by social knowledge. They lacked, perhaps, that special volume of learning we associate with men like the late Lord Justice Scrutton; on which it is perhaps a sufficient comment that the Russian system, since it ignores case-law, hardly calls for that kind of learning. They were men of robust common sense, immersed in their task, and, in all the cases I heard, able to bring out the issues involved with a clarity and a directness for which no praise can be too high. Though they are all civil servants, they no more regard themselves as servants of the executive than a judge in France or in pre-Hitlerite Germany. Their communism no more affects their attitude to a case than, let me say, the "inarticulate major premiss" of an English or American judge will affect his decision when he tries a case in which the issue, as in sedition, touches basic political principles.

I found no evidence to suggest that the right of recall is detrimental to judicial independence. It is, indeed, rarely exercised; a judge who conducts himself adequately has as little reason to fear dismissal as a judge in this country. Where the right has been exercised, it has usually been because the judge is lazy, or has a reputation for undue harshness, or does not seem to devote his energies to the discovery of the causes of crime. I found no fear of the executive power; and there was no sense, so far as I could see, that appointment to the higher posts had any of the political connotations it has with ourselves. Certainly there is no reservation of the best posts in the judiciary for political figures as we reserve them for the Attorney-General and other political lawyers.

I was, moreover, greatly impressed by the attention given by the professional judges to the significance of the cases with which they deal. In one People's Court, for instance, I found that the professional judges each made a monthly report on their cases to the chief justice. A conference then met to discuss their significance; and their general drift was then again discussed with the appropriate trade unions, government officials, and so forth. Where, moreover, any special inquiries seemed desirable, contact was made with the local Institute of Soviet Law, and researches were made into the possible meaning of the results discovered. If one imagines an English judge reporting, say, on his assize work to the chief justice with the latter organizing discussion of his report with trade unions, social workers, government departments and local authorities, and referring special points for analysis by



research to the law department of the nearest university, one would have an analogous situation. In England, such a development is the unattainable dream of the law reformer. In Russia, not, I suggest, insignificantly, it is a living and vivid reality.

The lay judges correspond, in the People's Courts, to our own justices of the peace; though there is nothing corresponding to their work in the higher branches of the judicial hierarchy. In the lowest Court, they usually sit for a week in the year, receiving their ordinary wages while they do so. There is keen competition for the nominations; and reappointment is fairly frequent. The lay judges all attend courses of instruction specially devised for them; and, from amongst them, a considerable number have gone on to acquire the professional qualifications needed for permanent judicial work. It is an impressive sight to watch them in Court; and one instance of their operations is perhaps worth recounting as a sample of their attitude.

I heard a case in which a woman assistant in a bookshop was tried for stealing therefrom 170 roubles. She was, I should judge, a woman of some forty years of age; and it was her second offence. She was examined first by the professional judge, the sharpness of whose questions reduced the defendant to tears. He gave her up, and the examination was handed over to one of the two lay judges, a working woman. With a quiet tenderness of which it is impossible to convey the impressiveness, she drew the whole of her story from the prisoner. She earned 90 roubles a month; she had a shell-shocked husband and four small children;

did not attend any night school; nothing was done to help her with the burden of the children; she was in debt, and had yielded to a sudden temptation. A telephone message brought to the Court a trade-union representative and a member of the management committee of the block of flats where the defendant lived. Arrangements were made for her to take classes in stenography and typing, for her children to go to day-schools, and for someone to look after her husband, three nights in the week. She was told to pay back 15 roubles a month while she earned her present wage; when her new qualifications gained her an addition to her wage she was to pay 15 roubles monthly. The woman left the Court a transformed person; clearly, for the first time in years, hope had come into her life. But even more remarkable was what occurred when she had left. The woman judge turned to her professional colleague and warned him against the kind of manner he had displayed; the defendant must be understood and helped, not attacked. If, she said, there was a similar case on another occasion, she would bring it to the attention of the local soviet, for his attitude was incompatible with the habits of justice.

This simple story illustrates, I think, the general atmosphere which surrounds the People's Courts. They are homely, straightforward, largely devoid of the stiffness and mechanical rigidity of our police courts. They render a popular justice in the best sense of the term. They have trained literally scores of thousands of workers to enter into the lives of their fellows and help them in the adjustment of their problems. There is a simplicity about their work, an atmosphere of



equality, an absence of that sense of the law as something outside and against normal daily life, which gives one a new vision of what the law might be made. It is, I think, important that the judges conceive themselves as bound to the task of social healing. They are resolving social maladjustments, and not merely inflicting penalties. They relate the cases they try to all the economic background they can discover. In the case I have narrated, nothing would have been gained by sending the defendant to prison; and little by binding her over on probation. What was done gave her a chance of personal development which strengthened her own self-respect; and it was accomplished with the minimum of administrative machinery as part of the natural expression of an environment to which judges not less than the prisoner equally belong.

Certain other aspects of the judicial system are worth emphasis. The method of investigating crime is quite different from our own. An official called an investigator makes a preliminary sifting of the evidence. The accused comes before him and is made acquainted with its bearing. All relevant facts and witnesses are examined, and at each stage the accused can appeal to the procurator if he is dissatisfied. He can ask for additional witnesses to be called or for other evidence to be investigated. When this preliminary inquiry is over, the investigator draws up a report which goes to the procurator. He, or one of his subordinates, then decides whether a prosecution should be based upon the result. The investigator, moreover, as soon as he is charged with analysis of a case, assumes control of all police operations. In several cases of this kind to which

I listened this had the interesting result that the police were employed to obtain information which the accused indicated was likely to bear out his claim of innocence. I was impressed by the impartial way in which this preliminary inquiry sought simply to discover the truth; and I thought it valuable that the method should, by its privacy, prevent that preliminary hearing in a magistrate's court which, in all serious cases in this country, compels the prisoner to undergo the grim burden of a double public trial.

Basically, I did not observe much difference between the general character of a trial in Russia and one in this country. The judge, no doubt, takes a larger part in the proceedings; he cross-examines witnesses much more freely than is our custom. If the accused testifies, he may find himself questioned by the Court in great detail. His advocate always has the last word; and he himself may, if he please, address the Court after the closing speeches. There is nothing like the technicalities or rigour of our law of evidence; the limit of testimony seems to be set by the Court's view of relevancy. Where sentence is to be pronounced, the prisoner's dossier is a document much more full and helpful than anything usual in Great Britain. It gives the prisoner's social background in a way which makes it possible for the Court to enter much more humanely into the circumstances out of which the crime arose. And the judge's greater knowledge of the general economic environment, his partial responsibility, also for its improvement, makes the imposition of punishment a far less mechanical process than it is with ourselves.

Political questions apart, the rights of an accused person seemed to me reasonably safeguarded. Arrest before trial is rare except in serious cases; bail is invariable in all minor offences, since any charge which does not involve a minimum sentence of one year prevents an accused person being held. There is a good deal of delay in bringing cases to trial—perhaps the outcome of the general Russian apathy over the problem of time. There is power in the higher courts to disallow speeches from the advocates. My own impression was that this did not work to the disadvantage of the prisoner; and non-communist lawyers with whom I discussed the matter were all agreed that in all normal cases whatever can be said for the accused is fully said. Indeed the whole Russian theory of crime as essentially environmental in character emphasizes this approach to the accused by the Courts. As I saw them, they are much more concerned with prevention and cure than with deterrence or punishment.

I was impressed, further, by a special power of review possessed by the Courts. Either the president or the procurator can, quite apart from the normal right of appeal, go into any case, even long after it has been closed, where, on examination, they have reason to believe that an inferior Court has made a mistake; and the central legal authorities have a similar power. Its exercise has often meant a re-hearing as long as two years after a case has been closed. It may mean interference in the middle of a case when the superior authority has found ground for dissatisfaction with the charge. Great pains are taken to

sure that the work of the lower Courts is continuously examined from this angle; and, though it throws a heavy burden on the judicial authorities, it maximizes the possibility of discovering error. All the officials with whom I talked placed great emphasis upon this power as a means of seeing to it that all that can be said for accused persons is fully examined; and the power is also used to grapple with one of the great difficulties of our own judicial system—the existence of wide variation of sentence for offences of a similar kind.

## IV

The office of procurator in Russia is one that has no analogue in this country. On one side, he is a public prosecutor; and this, no doubt, is one of his most important functions. But he is also entrusted with duties to the public, the significance of which is profound. It is his business to report to the executive on any legislation or ordinance which he considers against the public interest. He may urge its repeal or its amendment. He is charged with the supervision of all activities engaged in by judicial officers of any kind. The judge, the investigator, the advocate, even the police, are all, in a real degree, under his jurisdiction. He has also special functions in the realm of prison administration. He has to see that prisons are adequately run, he is concerned to prevent unlawful detentions; he can receive and investigate all prisoners' complaints; and he must see that any sentence imposed is carried out in terms of the law. He can decide that



a *nolle prosequi* should be entered in any case; he can interfere in a civil trial where, in his judgement, the interest of the State requires its representation; and he can move the Court to the reopening of any past case in which he has ground for believing that injustice has been done. I may add that he has a permanent representative in the offices of the OGPU to safeguard the public interest there.

The work of this department, which I examined at some length in Moscow, is of extraordinary interest. It has developed into the watch-dog of the public. Every sort of complaint is brought there and carefully examined. Its observation of the processes of law leads it both to seek, and to obtain, the constant revision of both legal procedure and substantive law. It is in contact with the Institutes of Soviet Law; and no small part of their legal researches receive their initial impulse from the procurator's office. I discussed problems with judges who again and again told me that some given issue, whether as to a prison or an institution, had been brought by them before the procurator. The public undoubtedly feels confidence in him; the stream of visitors to his department is evidence of that. He is in the closest touch with the trade unions; and he plays a considerable part in the judicial conferences which are a frequent characteristic of the Russian system.

He is less the actual maker of legal reforms than the propulsive instrument to them. His business is, both in principle, and in the individual instance, to watch for defects, and to see that steps are taken to their amendment. No experience I had in Russia was more im-



essive than a discussion with Mr. Vishinsky, the present procurator-general, of the working of his department. His part in the trial of the Metro-Vickers engineers in 1933 had, not unnaturally, predisposed me to think of him essentially in his capacity as prosecutor. I found a man whose passion was law reform. No one I met was more open about the weaknesses of the system, nor more clear about the steps he wanted to take for their improvement. He was less bound by the habits of his profession than any lawyer I have ever met. His interest in foreign experience was profound. He combined in himself not merely the efficiency of the able administrator, but the vision of the statesman. He was doing what an ideal Minister of Justice would do if we had such a person in Great Britain—forcing his colleagues to consider what is meant by actual experience of the law in action. He brought to the study of the law in operation an energy which we have not seen in this country since the days of Jeremy Bentham.

## v

The Soviet treatment of crime is well known in this country, since there is no realm of administration in which their achievement has been so dramatic. I do not, therefore, propose here to dwell upon material that is easily and more fully available elsewhere. I am rather anxious to emphasize certain aspects of the work, the significance of which has not, I think, been fully appreciated.

The principle that, since society is to be regarded

as partially responsible for crime, the object of punishment must be reform, has consequences in Russia wholly unknown in Great Britain. The first is the direct interest of the judiciary in the penal system. The second is the insistence that the prisoner must live, so far as conditions make it possible, a full and self-respecting life; from which the important inference is drawn that, since work is the basis of self-respect, the prisoner must work for wages at tasks similar in character to those of normal industry. The third is the high degree of self-government characteristic of Russian prisons. The view is taken that the severe discipline characteristic of older systems destroys morale and makes the return of the prisoner to normal life a difficult and, in cases of long sentence, perhaps an impossible adventure. The final principle to which I wish to draw attention is the effort, through the creative organization of leisure, to prevent that deterioration of character which seems so frequent in our normal prison population through deprivation of the habits and opportunities associated with normal social relations.

Of the principle underlying the Russian theory of prison treatment I cannot here speak in any detail since to do so would involve a discussion of the general ethics of punishment. What certainly emerges from its operation is the fact, borne out by the well-known investigation of Goring in this country, that there is no general reason to suppose that the average criminal is very different from the ordinary population. The outstanding feature of the system as it operates is its ability to educate the mass of prisoners to useful work,

that they can return to normal life without fear of recidivism. The fact that men with long records of convictions have become successful engineers, teachers, civil servants, business managers; that some have entered the Red Army and the Communist Party and amply justified their choice; this at least demonstrates that there is ground for experimenting with the Russian theory to a degree that no prison administration in the west has yet been willing to do.

I have spoken of the interest of the judiciary in the prisons. I met no judge and no procurator in Russia with whom prison inspection was not regarded as an essential part of his task. Many of them were interested, of course, in particular prisoners with whom they had been called to deal; some of them had gained a special interest in prison reform from their own grim experiences before the Revolution. Just as with ourselves Suffragettes and conscientious objectors greatly improved the level of prison treatment, so, unquestionably, the old revolutionists who continued, like Mr. Vishinsky, in the service of the law, had not forgotten their old experience. But the general motive for this interest was built upon the principle that no legal official can do this work properly unless he follows closely the fate of the men for whose destiny he is so largely responsible. The result of this attitude is the wholly admirable one that prison administration is subject to a constant stream of public criticism, the effect of which is to make it watchful of itself. It is not, as with ourselves, so withdrawn from the public view as to be incapable of effective discussion outside

a handful of experts. And those who are criticizing it are, by reason of their position, certain of being heard. If our judges were so situated that their view of prison treatment were constantly before the Home Office, we should, no doubt, get a somewhat similar atmosphere in Whitehall. As it is, British officials are inclined to dismiss most public criticism of their work as necessarily ignorant. That, I imagine, is why even so able an administrator as Mr. L. W. Fox does not, in his recent book<sup>1</sup>, think it even necessary to mention the remarkable criticism of our prisons carried out under the direction of Mr. Fenner Brockway and Mr. Stephen Hobhouse. Such silence would have been impossible in Soviet Russia.

The prisoner, I have said, must live a full and self-respecting life. All prisoners do normal industrial work, and they all receive wages. They have the right to a vacation; they receive a generous allowance of visits; their privilege of writing and receiving letters is practically unlimited and uncensored. They can smoke when they are not working. There is no prohibition upon talk with other prisoners or with the warders. No one who has seen over a Russian prison, and compared that experience with a visit to one in England, can doubt that the advantage is all on the Russian side. The prisoners with whom I talked were, young and old alike, men who were conquering themselves. No doubt there are failures. But the impression I had was the quite definite impression that those with whom I talked would return to the world far more fitted to cope with its problems than before. They had

<sup>1</sup> *The Modern Prison System* (1934).



been disciplined into machines. They had learned value of regular labour. They had not been made feel that they were cut off from the outside world. They had no sense of being under the continuous supervision of an unfriendly eye. There was neither bitterness nor fear about them. I think, on any wing, that these are great gains which say much of the theory which underlies their treatment.

The performance of normal industrial labour at regular wages is, of course, the pivotal thesis in that treatment. But I should be surprised if experience did not demonstrate that the creative use of leisure for the prisoner is only less important. Wireless, classes in cultural and vocational subjects, gymnastics, books, dramatic performances, concerts both for, and by, prisoners, a prison newspaper, in which the right to make complaints is an essential feature, all these are universal. I met prisoners who, in their leisure time, were attending classes at the university. They went to and from prison unguarded with no fear of their running away. I met two men who, while still serving their sentences, had qualified respectively as a lawyer and a chemical engineer in Moscow University. In one penal settlement, the wholly admirable secondary school had mural decorations by a group of prisoners who had learned this art in evening classes in prison. I was struck by the excellent relations between the prisoners and the warders, and the presence of men who were living a useful life untainted by that torture of separation from the power to fulfil personality which is the dominant feature of our present system.



Important, further, is the idea of self-government. In the closed prisons all minor warders' work is in the hands of the prisoners themselves. Their newspapers give them opportunity of self-expression which releases a good deal of energetic resentment which, otherwise, might easily seek a less desirable outlet. The degree to which prisoners are put on their honour has also an excellent effect. The unaccompanied holiday at home, the uncensored correspondence, the right to receive visitors without supervision, all remove that constant sense of being humiliated which I believe to be one of the most destructive features of our own system. In the OGPU settlement of Bolshevo, where self-government has gone much further than elsewhere, the fact that all punishments are in the hands of the prisoners themselves when discipline is broken seems to reduce infractions of it to remarkably small proportions. I emphasize, too, the power to possess things of one's own. The man in the camp at Bolshevo who had bought a fine balalaika for his wife out of his wages was a different human being by reason of that achievement. It is in the interplay of these features that I believe a good deal of the explanation of the surprisingly small percentage of recidivism is to be found. The Russians have, I think, made the important discovery that a determined effort can, in the right atmosphere, restore a man's self-respect, and that once there is not, as with ourselves, a grave economic problem of after-care, there is every reason to hope that he will become again an effective citizen in the full sense of the word.

## VI

one can study the Russian legal system with any attention without being impressed by the importance attached to research; and I doubt whether there is any aspect of it in which the contrast with ourselves is so important. It is not merely the existence of numerous institutes specifically devoted to research; though this, in itself, is significant. Even more, I think, it is the degree to which the legal officials recognize its vital place in their scheme of things.

A distinguished academic lawyer is not, as with us, a person placed somewhat apart from the profession generally. He is related closely to it at every point;

his connexion with the law-amending process is regarded universally as integral to its success.

The first result of this attitude is a happy freedom from that tough obstinacy to law reform which is the standing characteristic of the legal profession in this country. The lawyer is not a practitioner, whether judge or advocate, merely. He is a man trained by an atmosphere in which he is immersed to a public responsibility for his work. Partly, I think, this is a function of the curriculum he studies. Law in Russia, as in the best Continental schools, and, as notably with a man like Frankfurter in Harvard or Charles Clark at Yale, is a social process to be related to the total, and especially the economic, environment it expresses. The result is an approach not dominated, as with us, by what William James called "habit without philosophy." The lawyer is not a man searching for a case which to prove his point for a client. He is applying

a body of principles to a concrete situation from an attitude that tends to assure a social judgment upon the result.

Out of this is born a constant preoccupation with the amendment of the law. This is not merely the collection of legal statistics. It is a constant and sustained effort to investigate law in action and, thereby, to judge law in action. It is a frequent occurrence for the professors at one of the Institutes of Soviet Law to be called in to report upon the working of some rule or doctrine with which a Court has become dissatisfied. The kind of inquiry which, with ourselves, is somewhat rarely accomplished by the cumbrous machinery of a Royal Commission or a Departmental Committee, is in Soviet Russia a normal feature of the system's operation. And the work of the procurator's office assures that this is done over a wide area. He is in daily touch with the trade unions. The impact upon them of labour law, for instance, assures a constant scrutiny of its effects. If you compare this situation with the problem we confront in our effort to get a reasonable revision of the law relating to workmen's compensation, where every fact alleged is still a matter for challenge, you get some measure of the loss we suffer by the haphazard and episodic approach we make to knowledge of our own legal processes as these are reflected in the daily lives of those who live by their results.

Clinical legal research, to use the happy term of the Cambridge Law Faculty,<sup>1</sup> is central to the administra-

<sup>1</sup> See their memorandum of evidence to Lord Atkin's Committee on Legal Education (1934).

of justice in Russia to a degree that we have not begun to envisage. That is one of the results of the individualism characteristic of the legal profession in Great Britain. The Russian lawyer is merely immersed in building up a private practice. His position in the collegium to which he is attached is not the social problems of the law as essentially part of his normal vocation as winning his actual living. I predict with some assurance that, in this respect of Russia's legal system, the whole world will look to Russia in the next generation. As their legal science is made articulate for the Western world, it is likely to have an impact upon both doctrine and procedure comparable in character to that exercised by the Reception in Germany four hundred years ago. The future of law largely depends, as the Russians have seen, in its adequate adaptation to its economic environment. If this adaptation is to be effected, then the law must be studied as a branch of sociology, and the experience of trade-union officials, of social workers, of economists, of medical men, becomes fundamental to the doctrines it embodies. Once this experience is envisaged in the context of matters like workmen's compensation, divorce, the law of debtor and creditor, to take only some notable illustrations, it is surely obvious that the lawyer cannot fulfil his function unless as the principles he shapes are permeated by a valuation of the consequences of the doctrines laid down by the Courts. This valuation lies at the root of the Russian legal administration. It has put their work on a level with the best done in recent years in the United States—the crime survey of Cleveland, for



example, or the remarkable study of Boston now being carried out under the direction of Professor Frankfurter.<sup>1</sup> We have nothing of comparable quality in Great Britain, largely, I think because the legal profession here, lacking any profound consciousness of social purpose, has never conceived it as its duty to inquire into the results of its own operations.

The situation in philosophic and historical research, especially on the comparative side, is in a different position. Much of it is interesting, some of it, the work, for instance, of Pashukanis, of high quality. But I think its value is definitely limited by the need for a mechanical conformity to Communist formulae. I do not doubt that the Marxist interpretation of law has, especially on its historical side, thrown valuable light on dark places, especially in the discussion of legal conditions under the Czarist regime. But I feel also, so far as my knowledge extends, that this field of research is handicapped by the fact that most investigators already start out with their conclusions implicit in their premisses, and that they underestimate the degree, long ago emphasized by Engels,<sup>2</sup> to which the lawyer's quest for formal adequacy leads him towards doctrines of which the materialist analysis can, at best, be but a partial explanation. No doubt much of this attitude arises from the exaggerated enthusiasm of a new social system in its first

<sup>1</sup> *Criminal Justice in Cleveland* (1922); of the Boston survey, the first volume only, that on juvenile delinquency by Professor Glueck, has so far been published (Harvard University Press, 1934).

<sup>2</sup> Letter to Conrad Schmidt, October 27, 1890 (*Correspondence of Marx and Engels* (1934), p. 477).



phase. What is more important than the error of over-emphasis is the fact that the importance of this field is realized. For any student of the Common Law cannot but feel how gravely it suffers from the absence in this country of any serious interest in legal philosophy, or of any sustained devotion to historical research in law. In the first realm, since Austin's day, the number of English legal philosophers to whom serious attention need be given can be numbered upon the fingers of one hand; and in the historical field, names like those of Maitland, of Pollock, and of Holdsworth still enjoy a somewhat lonely eminence. No one can visit the Institutes of Soviet Law without the sense that the urgency of first principles is understood, however much one may doubt the wisdom of postulating certain fixed principles as orthodox; and it is important, especially in the effort to deal with the primitive peoples of Soviet Russia, that the history of legal rules should receive so vigorous an emphasis wherever law is being studied. No Englishman can help a sense of envy when he watches the magnitude of the Russian effort to forge ahead with the investigations of this kind.

I should add that work in this realm is enriched by the insistence that legal philosophy and history must never be divorced from their sister sciences. The connection of the investigator of law with his fellow students of anthropology, psychology, economics, and even medicine is constant and direct. The Russian lawyer would no more think of grappling with the problems raised by insanity in connection with crime without the aid of psychologist and doctor than an

English judge would consider reopening the rule in *McNaughton's case*.<sup>1</sup> The application of legal principles to the problems raised by the primitive races is done invariably upon the basis of expert anthropological inquiry; and I hazard the opinion that the remarkable achievements of Soviet Russia in grappling with the issues raised by the question of nationalism<sup>2</sup> is largely due to the insistence that only the anthropologist can provide the foundation upon which effect legal administration can be built. Any one who compares the temper in which Macaulay approached the making of his Indian Codes with that in which the Soviet lawyers have approached comparable tasks will, I think, have some appreciation of the regard paid by the latter to the importance of science as the background of principle. And, *mutatis mutandis*, this attitude is characteristic of the whole realm in which law has significance.

I stress all this because, as a student of politics to whom legal doctrine is necessarily of vital importance, I cannot help feeling that the English lawyer has missed immense opportunities of throwing light on social problems by his indifference to research. We make no effort to bring our lawyers into contact with the material which, almost daily, alters the perspective of their problems. We are content with a situation in which even the most distinguished academic lawyers are regarded as apart from the main-stream of the profession. We have no institutes of advanced legal studies. We have no Ministry of Justice in which the

<sup>1</sup> (1843) 10 Cl. & Fin. 200.

<sup>2</sup> Cf. Hans Kohn, *Nationalism in Soviet Russia* (1930).

perpetual scrutiny and, therefore, amendment of the law may be undertaken. The professional bodies in the law have a corporate sense as strong as any in this country; but zeal for either research or reform plays no part in the expression of that corporate sense. We do not require from our judges any consistent account of the impact their judicial experience has made upon them. We appoint thousands of lay judges with no effort to train them for the important work to which they are called. There is not one of these spheres in which the attitude of Soviet Russia is not the antithesis of our own. That is why any reflection upon the Russian atmosphere must lead any Englishman to the conclusion that the times require a new Bentham.

## VII

There is one final institution in Russia which deserves a word. In a full sense, it is not perhaps a legal institution; though, with the blessed word *quasi* I can, I think legitimately, discuss it in this context. Russia is honey-combed in factory, in farm, in apartment-house, with the institution known as a Comrades' Court, and this account would be even less complete than it is if I did not briefly discuss it.

The Comrades' Court is not a state judicial organ in the ordinary sense of the term. It is a quasi-judicial body representative of public opinion in the unit where it exercises jurisdiction. Its judges have tenure only for the actual sitting over which they preside, and they are elected *ad hoc* by the factory workers,

the dwellers in an apartment-house, or the members of a collective farm, as the case may be. There is no official procedure at its sittings; those I attended were conducted very much like an English trade-union meeting, with everyone present who felt he had anything relevant to say making his contribution. The maximum punishment the Court can inflict is a fine of 10 roubles—or about 10 per cent of the monthly wages of the lowest-paid Russian worker. The Court can make representations to the management about the conduct of a worker in a factory which may result in his dismissal by the management, or it may initiate the expulsion of an undesirable tenant from his apartment. In the industrial field and on the farm, the tendency is for the judges of the Courts to be the best shock-workers there; this is the case in about 90 per cent of them. In other spheres, the tendency is to elect the men and women who are regarded by the relevant constituency as possessed of the best reputation for social initiative.

The real function of the Courts is twofold. On the one hand they bring the pressure of public opinion to bear on citizens who are held by their comrades to have shown a defective sense of social responsibility in some minor matter. It may be persistent lateness in work, or uncleanness in the home, or unjustifiable absenteeism, or excessive rudeness to other tenants in the apartment-house, or a slanderous tongue, or negligence in carrying out orders. Whatever the offence, the Court has the invaluable effect of making the culprit aware of public standards to which he must accommodate himself. He learns to respect the



authority of the Court not from the penalties it may impose—in half the cases I saw it imposed no penalties at all—but from the public analysis of the alleged fault and the subjection of the offender to the criticism of his fellow workers or neighbours. The fact, of course, that tens of thousands of citizens have poured into the towns since the Revolution makes this self-imposed discipline a particularly valuable part of the process of social education.

It not only teaches discipline to all who are concerned in it. The Court is at every point a lesson in the art of conciliation. Quarrelsome neighbours, indifferent workmen, learn that they do not live to themselves alone. For the judges of the Court the work is of real importance partly as a lesson in government and that art of effective self-expression which is so near to the heart of successful rule, and partly as a useful introduction to superior administrative tasks; there are many members of Comrades' Courts for whom service thereon has been the prelude to election to a local soviet. The institution, further, is a step towards the realization of Lenin's insistent principle that as large a proportion of the population as possible should be related directly to the business of government. He saw, from the first days of the Revolution, the creative part that civic responsibility can play, however small be the authority conferred. There can be no doubt that literally scores of thousands of men and women have been educated to a sense of their social function by participation in the work of these Courts.

What is vital in the institution is the fact that their



status is not imposed from above by the law but grows from within by the force of the approval they win from the constituency they serve. The committee-character of the proceedings is the root of this approval. A corporate opinion grows before one's eyes as one listens to the proceedings; those present are not silent spectators, but citizens whose comments, even whose attitudes, are always relevant to the decision reached. It is important, further, that the ability of the judges to retain their place is a direct function of the satisfaction aroused by their decisions. These are perpetually canvassed by their constituency; I have even heard an offender, after a decision had been given, discuss in detail with an interested audience why it was inadequate in the light of the evidence offered. I was particularly impressed by the Courts in dealing with marital relations, and with cases in which a male worker had been offensive to a woman worker in the same shop as himself. On this side, the Courts are a school of conciliation and neighbourliness. They introduce what may be termed justice without law into all the relations of social life, in a way that undoubtedly adds to the quality of living. And the Courts are significant, further, because they have brought to the surface the immense reservoir of stout common sense the workers possess, and given it an institutional channel of expression significant far beyond the immediate purposes to which it is limited. I cannot easily imagine a method of discovering judicial ability more effective than this. If our Justice of the Peace satisfied the kind of criteria a member of the Comrades' Court must satisfy to retain his

position before he is elevated to the Bench, it would, I think, raise the standard of work in our local police courts to a level beyond anything they may at present aim to have attained.

## VIII

Law," said Lenin, "is a political measure, law is politics." No one can examine the foundations of legal doctrine in Russia without the sense of the completeness with which this conception has permeated the whole fabric of the law. Behind all of it is the relentless purpose of consolidating the dictatorship of the proletariat. In every phase of the law, property, contract, tort, crime, its end is the threefold one of crushing counter-revolutionary resistance, of freeing the workers from the impact of what are regarded as capitalist habits, and of building up a social outlook able to work the principles of the communist society.

In all this there is nothing, I think, at which an English student of law need be surprised. The Soviet system of law does what the English system does; it puts the supreme coercive power of the State behind the fundamental premisses of the regime of which it is the expression. The effective difference between the two systems is less, I believe, in their inherent nature than in the fact that, partly for historical reasons, our fundamental premisses are much less explored and much more inarticulate than are those of the Soviet regime. An English judge will reach his appointed purpose much less directly and much more elaborately than a Russian judge in similar

circumstances. His intervention in, his own views of, the proceedings will be more rare and more delicately indicated than those of his Russian confrère. The fact that he is part of a system with infinitely longer traditions and, therefore, of much profounder stability will make his relation to the case he tries much more implicit than a Russian can easily understand. Something, also, must be allowed for the continuing tensivity in Russia of the revolutionary atmosphere; the psychology, I suspect, of the average Russian judge in a case in which the interest of the State is nearly concerned resembles somewhat that in which our tribunals tried conscientious objectors during the War: the unstated assumptions of the judicial mind come more clearly into the foreground where the decision is made. But, this said, the habits of the Russian judicial system operate, so far as I have seen them, in conformity with the best canons of legal administration.

The interest, of course, of the Russian system for ourselves, lies in the different premisses from which it starts, the different ends, therefore, implicit in its functioning. These I have not here to discuss, since to do so would take me into a discussion, not here in place, into fundamental political principles. My conclusions must dwell upon humbler ground. I believe that the analysis of Russian methods reveals much from which we may profitably learn. I am convinced that there is high value for ourselves in the system of judicial relationships which obtains. The lay judges perform the valuable function of relating legal principle to social environment in a way that is, in my judgment, more effective than the jury system as I

have known it; and it secures in a real sense, too often absent from our own legal administration, that an accused person really is tried by his peers. I believe, secondly, that no detrimental results from the fact either that the judge must seek reappointment or that he is an executive official in a more formal sense than we recognize as wise. The answer to the fears we have of either of these habits lies in the fact that the requisite independence of judges is much less a matter of statutory organization and much more a question of the spirit of the Courts. Here I am convinced that the average Russian Court compares favourably with any I have seen, and is certainly to be preferred to that of some American States. Formal independence of the executive did not, let us remember, prevent the judicial murder of Sacco and Vanzetti, or the iniquitous imprisonment of Mooney. What Courts will do in the class of case where their need to be independent is vital is a function of the total political atmosphere in any country. If it would be difficult for a counter-revolutionary to prove his innocence in Russia, it would, equally, be difficult for a Communist to prove his innocence of a quasi-political offence in most European countries and in the United States.

Every community evolves a legal system which corresponds to its own history; and the evolution of our own methods will clearly depend upon the course our own future takes. Yet I believe the experience of Russia ought to suggest to us a scrutiny of our own legal technique if only because, since Bentham's day, there has been no serious revision of its foundations. If ever that scrutiny should be undertaken, Russian



experience will, I think suggest at least the discussion of the following questions :

- (i) The organization of, and admission to, the legal profession, and the desirability of continuing its present separation, and its highly individualistic basis. Bound up with this is the whole method of legal education which I believe to be in grave need of reform.
- (ii) The appointment of judges, both lay and professional. I believe it to be wholly undesirable that the former should continue to be chosen as now, and that they should continue to hold office (unless removed by the Lord Chancellor) for life without the need in some way to prove their qualifications for their work. I think it is important, also, that the professional judges should be recruited at a younger age, and that the county court judges should not, so largely as now, be chosen from barristers who are not regarded as adequate for the high court and are practically without hope of promotion thereto. No judicial system is adequate the majority of the members of which are deprived of the prospect of promotion.
- (iii) It should be an obligation of the judiciary to report upon the experience they have of the law as it works, and to make proposals for its continuous amendment. Though there is institutional provision for this in our system, it has practically remained unoperative.
- (iv) A Ministry of Justice is an urgent requirement



with adequate facilities for clinical research into the law. It should not be staffed wholly by lawyers, and it should have the same facilities for encouraging inquiry into legal administration and its improvement as the Ministry of Health exercises in its own field. To it should be transferred the responsibilities now exercised by the Lord Chancellor and the Home Office, including the latter's jurisdiction over prisons and police.

- (v) A thorough inquiry is needed into the whole subject of prison reform in England, with a full opportunity for investigating Russian experience. On such an inquiry it is essential that the official element should not predominate.
- (vi) There is need, also, for a full inquiry into the place of the jury in our system with special reference to the question of whether it should be retained in civil cases.
- (vii) The creation of bodies like the Comrades' Courts should be considered, especially in relation to the part they might play in minor offences now punishable by the ordinary police courts.
- (viii) An inquiry is needed into legal procedure with a view (*a*) to its simplification, (*b*) its cost, (*c*) the possibility of codification. Any such inquiry should include the consideration of limiting the power of appeal.
- (ix) The local authorities should be required, in conjunction with the proposed Ministry of

## LAW AND JUSTICE IN SOVIET RUSSIA

Justice, to organize bureaux of consultation upon legal matters; payment for this service should be according to means.

- (x) There should be created the office of Public Defender to undertake the defence, in all suitable cases, of poor persons accused of major crimes.
- (xi) The universities should be encouraged, through the opportunity afforded by the powers of the University Grants Committee, to specialize in legal research, especially of a "clinical" kind. For this purpose the development of a closer connexion between law and the other social sciences in the universities is of the first importance. Steps should be taken, through appointment to the minor judicial posts of the country, to bring the academic teachers of law into direct contact with its practical administration.

Granted the present state of our law, I do not, of course, put forward these proposals in any optimistic spirit; I remember only too well that half a generation has passed since Lord Haldane worked out in detail his proposals for a Ministry of Justice, and nearly seventy years since Lord Westbury indicated the need for a thorough reform of legal education. Their failure to interest the profession in their ideas suggests sufficiently the fate that awaits most people who develop a passion for reform of the law.

Yet no one who has observed the results of the profound changes Russia has accomplished in the crowded

years since the Revolution can doubt the need to emphasize its urgency. Soviet justice may be more untidy than ours. It has none of its panoply, its traditions are less majestic. I yet believe that, as it works in normal life, it has achieved beneficent results it is in our own power to effect if we had the courage and the energy the Russians have brought to their work. Among laymen, at least, our system does not command anything like the complacency with which the profession regards it. There is a sense abroad that the time has come to examine its foundations; when the attempt is made, no observer can seriously doubt that an analysis of Russian experience will play no small part in shaping the conclusions towards which we shall move.

*The Judicial Function*

## I

IN recent years an ardent and healthy controversy has centred around the nature of the judicial process.<sup>1</sup> The realists have attacked with vigour what may be termed the formalist view of legal decisions and have emphasized, with much reason, the degree to which the bias of the personal equation enters into the selection of the *ratio decidendi* of a case. They have shown, and, I think, usefully shown, that the limits of prediction in a legal controversy are in fact far wider than the notion of law as a science has previously permitted us to suppose. Indeed, there have been moments when they have almost seemed to suppose that the judicial process may be legitimately compared to a gamble in which, whatever the facts, the odds are equal in favour of either party.

In fact, of course, this is an exaggerated view, though, be it added, there has been a real value in the exaggeration. The degree to which the judge is free to innovate at his discretion is more narrow than the realists have admitted. Precedent, professional tradition, the zeal for uniformity, a common conception of the ends the law should serve, all these exercise a profound effect in limiting the range within which the judge feels free

<sup>1</sup> Cf. Jerome Frank, *Law and the Modern Mind* (1931), an interesting introduction to the subject which contains an ample bibliography.

to move at his desire. It is not, indeed, improbable that, despite all the vagaries of which Bench, Bar and juries are capable, the great mass of cases implicate results which a good lawyer can predict with at least sufficient certainty to persuade his clients to confidence in the law. What, in short, the realists have forgotten is that if law were in fact so hazardous a gamble as they imply people would not go to Court with anything like the frequency they do. The lack of confidence in judicial decisions that is characteristic of our era is due less to any doubt of what the Courts will do, than to popular dislike of the expense of judicial proceedings, on the one hand, and the substance of judicial decisions upon the other.

The thesis of this paper is the need, in all analysis of the judicial function, to emphasize the significance of the fact that the judge is an instrument of the State-power. There, as I think, lies the fundamental cause of the uniformity of judicial decision, the power, accordingly, to predict its probable nature in the overwhelming number of cases. Both the formalists, on the one hand, and the realists, on the other, have, in my submission, overlooked the significance of this institutional factor in their analysis of the judge at work. This omission has had an effect upon the doctrines of each of these schools of thought which has involved an analysis at once partial and incomplete. The formalist has forgotten the degree to which the postulates of judicial logic are provided for the judge by the State; they have over-emphasized the independence of the Courts and made its law a body of principles judicially determined which live apart from the sources which



## THE JUDICIAL FUNCTION

give its character to the living law. The realists have looked at the behaviour of the individual judge; and in their emphasis upon his power to select a *ratio decidendi* they have, in their turn, failed sufficiently to notice that, as an instrument of the State-power, the range within which he is in fact free to undertake this selection is more narrow than their view makes it desirable for them to admit. My submission, in short, is that unless we weigh adequately the significance of the judge as an instrument of the State-power, we shall be wholly unable to determine the true nature of the judicial function.

### II

The State is the supreme coercive power in any given political society. It lays down the ultimate rules of behaviour which govern the relations of men. It lays them down, no doubt, in order that their welfare may be achieved at the maximum deemed possible by those who effectively control its authority. But it is important to realize that this maximum welfare as an end is rarely, if ever, an objective thing agreed upon as desirable by all members of the society. It is invariably conditioned by the nature of the society. Maximum welfare in a society of slave-owners is not conceived as one in which the slave-view of welfare is entitled to count. Maximum welfare, also, in a feudal society is determined by the view of the owners of land about its character. Maximum welfare, again, in a society in which the instruments of production are privately owned will be differently regarded from the view taken of it in a

society in which, like Soviet Russia, the instruments of production are owned in common. So, once more, a society in which uniformity of religious belief is enforced upon its citizens will take a different view of heterodoxy as a habit of behaviour than one which is indifferent to the religious beliefs of its members.<sup>1</sup>

In every State supreme coercive authority is used to further those relations implied in the prevalent conception of the common welfare. If it is a slave-owning society, the relations it will further are those which enable the slave-owners to exact the maximum benefit from their possession of slaves. If it is one built upon the hypothesis that the private ownership of the means of production results in maximum social benefit, its rules will be so conceived as to protect as fully as possible the interest of the citizens who own those means. In a society which seeks to enforce religious uniformity the rules of social behaviour will operate to the disadvantage of those who are unable, for whatever reason, to conform to the prevailing creed. In each case those who make the law in this way will not be acting in any spirit of selfish exclusiveness. They will sincerely believe that the application of their conception of what the common welfare is at any given time includes the welfare of their opponents and critics not less than of themselves. So Aristotle did not doubt that slavery was good for slaves. So, also, Herr Hitler does not doubt that his conception of German well-being must be enforced upon his critics in their own interest.

The State-power in any given society, therefore, is

<sup>1</sup> Cf. my *State in Theory and Practice* (1935), pp. 104 f., for a fuller treatment of this question.

## THE JUDICIAL FUNCTION

authority used to enforce a particular conception of the common welfare. That conception is always a function of the fundamental characteristics of the society; and since the main element in any society is the way in which it earns its living, the fundamental characteristics will be mainly determined by the relations which arise out of the way in which men earn their living. If, for example, as in a society predominantly built upon individual ownership, the profit-making motive supplies the main ethos of a society, it will follow that the main ethos of the laws in that society will be the protection of such relations as ensure the successful making of profit by the class which owns. An effort on the part of those who do not own to interfere with the successful making of profit will, accordingly, appear from the angle of the law to be a threat to the conditions upon which the common welfare of the society is held to depend.

It is in the light of these conceptions that the judicial function must be interpreted. The judge is an official of the State appointed to resolve controversies, whether between the government and a citizen, or between one citizen and another, in which it is alleged that the laws of the State have been broken. He has therein a twofold function. On the one hand, he has to find what the law is; on the other he has to determine its relation to the particular case he has to decide. It is, of course, clear that in each of these aspects he has a certain freedom. He has to decide what facts in the given case are relevant to legal principles; and he has to decide, in the light of this determined relevancy, under what principles of law the case falls as he sees what the case

is. In each aspect, there is, clearly enough, a considerable margin within which he has room to innovate; it is this room which provides the field for what is termed judicial legislation. But, in each aspect also, the fact that he is an instrument of the State-power limits the room at his disposal. There may be a weight of evidence in one direction rather than another. His conception of the relevancy of facts may bring the case within some given precedent or provision of statute. He is rarely free to make law simply out of whole cloth and in his own discretion; and in so far as he feels that the nature of the case he has to decide leaves him a considerable range of choice, there will be poured into the substance of his decision a content in large part independent of his individual will. For it is not the function of the judge to reach a conclusion which is in his opinion just. He is an official of the State-power limited in his view of what is just by the obligation to fit his conception of justice to the requirements of the law. That law gives to justice a content limited always by the fact that it must square with the end the State is seeking to pursue. If it is a rule of the law that private property cannot be taken without compensation, he cannot transcend that rule in his decision unless the facts of the case with which he deals come under an exception for which express provision has been made.<sup>1</sup>

In a broad way, that is, the rules of law in a particular community have been made to protect the way of life that community has chosen. All law is a series of

<sup>1</sup> See the special report by L. Scott and A. Hildesley, *The Case of Requisition* (1920).



## THE JUDICIAL FUNCTION

inferences from that way of life; and the State-power is there to protect them lest there be divergence from the way. This protection, normally, is most clearly shown in the process of legislation. This is a body of rules instructing the members of the society, under a penalty which, in the last resort, will be enforced by all the coercive authority of the State, to behave in one way and not in another way. Behind the rules will always be found an implicit philosophy of the common welfare which tacitly assumes the logic inherent in the way in which the society earns its living. For that way involves a discipline of behaviour, which members of the society must observe if established expectations are to be fulfilled and the necessary goods and services available to its members. Granted, for example, an individualistic society, there will flow from the fact that it is individualist, conceptions of property, contract and tort which cannot be transcended in any fundamental way without the society ceasing to be individualist. The judge may, in a given instance, believe that an individualist society is incompatible with the common welfare. But he will be unable, as a judge, to transcend in his decisions the framework within which he is bound. Even Mr. Justice Holmes, in pleading for a wide interpretation of constitutionality, still held that he was bound to declare statutes unconstitutional if they violated the plain letter of the basic document.<sup>1</sup> And the confinement of the judge to what he called interstitial activity narrows in a fundamental way the degree to which he may hope to innovate widely. At every point in his activity, in short, the effect of the

<sup>1</sup> *Collected Papers* (1920), p. 296.



pressure to which he is subjected makes him seek to relate his decisions to previous experience rather than to future hope.

### III

Law, of course, has continually to be adapted to new situations. But any one who studies in close detail the process of adaptation will find running through it as its spinal column an endeavour on the part of most judges to respect the fundamental ethos of the society. Where this ethos, for example, includes the classic conception of freedom of contract judicial interpretation will always scrutinize narrowly any attempts at its invasion. The history of the attitude of the Anglo-American Courts to trade-union law is incapable of explanation save on the hypothesis that judges were unable, in the absence of peremptory statute, to reconcile themselves to the view that organizations of workingmen may legitimately interfere with the legal right of business men to do what they will with their own.<sup>1</sup> The same hypothesis only can explain the attitude of the American Courts to legislation regulating the hours of labour.<sup>2</sup> The decision of Lord Abinger in *Priestley v. Fowler*,<sup>3</sup> and the doctrine of common employment which followed thereon, was the outcome, predominantly, of a mental climate which held that maximum benefit to the community would follow from legal rules which

<sup>1</sup> Cf. my note in the *Report of the Lord Chancellor's Committee on Ministers' Powers* (1932), pp. 135-7.

<sup>2</sup> Cf. F. Frankfurter, "Hours of Labour and Realism in Constitutional Law" in *Harvard Law Review* (1916), Vol. 29, p. 353.

<sup>3</sup> (1837) 3 *M. and W.*, 1.

placed the least possible burdens upon an employer. The attitude of the British judges, especially in Scotland, to the treason trials of 1794,<sup>1</sup> or that of the American judges to sedition cases from 1917-20,<sup>2</sup> reveals a mental climate in which they regarded themselves as pillars of the State whose function it was to protect its foundations from criticism and assault. The history of the cases of Mooney and Billings in California, of Sacco and Vanzetti in Massachusetts<sup>3</sup> is the record of evidence breaking in vain against certain primary assumptions all related to the idea that judges must protect the State-power against the attacks of men regarded as evil because they deny the coincidence of the State's end with the end of the common welfare.

It is in this background that the ideas of judicial independence and impartiality are to be set. In every well-organized State precautions must be taken to safeguard the judge against fear of dismissal for an unpopular decision. British judges, certainly, and at least the Federal judiciary in the United States have a guarantee as absolute as human ingenuity can devise against subjection to undue pressure from the other branches of government. Yet a close scrutiny of their decisions in all cases which have a partial "political" flavour does not suggest that the other branches of government stand in any danger from their independence. The tendency of police magistrates in England

<sup>1</sup> Cf. Cockburn, *Examination of the Trials of Sedition in Scotland* (1894).

<sup>2</sup> Cf. W. Nelles, *Espionage Act Cases* (1921).

<sup>3</sup> A full record of the whole testimony is available. *The Sacco-Vanzetti Case* (1929). For an excellent summary, see Esmond K. Fraenkel, *The Sacco-Vanzetti Case* (1930).

to accept police evidence without adequate scrutiny has been widely commented upon in recent years.<sup>1</sup> The attitude of the lower American Courts to strike cases, especially where disorder has been prevalent, shows a similar tendency. The extension of the injunction by State and Federal Courts in American labour cases has revealed a mind in the judiciary which it would be difficult to distinguish from that of the plaintiff in actions of this character.<sup>2</sup> And it is not unfair to suggest that the relation between judge and counsel in many American corporation proceedings of recent years reveals that formal independence offers no safeguard that evidence will be fully scrutinized. The judge is independent in a sense which is no doubt of vital importance; but that independence, in its turn, is so subtly related to the problem of impartiality as to make the latter the real clue to what independence implies.

Impartiality, clearly, has two sides. On the one hand, it means a willingness to allow all to be said in Court that relevance and the rules of evidence permit; to be said, moreover, in such a way that it is able to carry its full weight. On the other, it means an ability to bring to the task of decision a mind that can rise above all considerations of personal conviction and private feeling. Generally speaking, at least in the higher Courts of most States, the first type of impartiality is in normal times general and widespread; men like Judge Webster Thayer are, happily, rare on any Bench.<sup>3</sup> But the second type of impartiality is, I submit,

<sup>1</sup> Cf. H. R. G. Greaves, *Reactionary England* (1936), p. 10.

<sup>2</sup> F. Frankfurter and N. Greene, *The Labour Injunction* (2nd edition, 1936).

<sup>3</sup> On Judge Thayer, cf. Fraenkel, *op. cit.*

much rarer than it is the custom to recognize; and its rareness lies at the very heart of the problems inherent in the judicial function.

The essence of this aspect comes out most clearly in the type of case which raises quasi-political considerations. No one would now accuse Mr. Chief Justice Marshall of this type of impartiality; his long and eminent career on the Supreme Court of the United States was an exercise in the promotion of the political creed he served so ably before he went on the Bench. It is, indeed, notable that few American judges who have made their mark have failed to bring to their decisions a body of strong political presumptions which have coloured the results at which they have arrived. Their *rationes decidendi* were selected in terms of a process, no doubt in large part unconscious, which postulated certain ends and means as unconstitutional before ever the cases they decided came into Court. In the period, for example, from 1931 to 1935 it has always been possible to predict beforehand the view that would be taken by McReynolds, Butler, Sutherland and Vandevanter J.J. to the constitutionality of New Deal legislation. In an earlier epoch, it was necessary for Mr. Justice Holmes to remind the Supreme Court that the Fourteenth Amendment to the American Constitution did not enact Mr. Herbert Spencer's *Social Statics*.<sup>1</sup> The mere fact that candidates for a vacancy on the Supreme Court will be scrutinized rigorously in terms of their political opinions is evidence enough of the difficulty presented by this second aspect of impartiality.

The problem is not solved by saying that the issue

<sup>1</sup> *Adair v. U.S.*, 208 U.S., 161 (1908).



in America is special, since there the Supreme Court is, in effect, a third branch of the legislature. Something at least, of what the Supreme Court does in the United States is done by the judges in Great Britain by way of statutory interpretation and the doctrine of public policy.<sup>1</sup> Sir Frederick Pollock has said that many judicial opinions are unintelligible save upon the assumption that the judges did not like the effect of the legislation they were asked to interpret, and did their best to construe it away.<sup>2</sup> Public policy, as used in the classic *Osborne* case,<sup>3</sup> was inexplicable save as a judicial attempt to obstruct the influence of a trade unionism which the judges did not understand and, so far as they understood, disliked. The barriers which English judges have, in the post-war years, placed in the way of social legislation like that of housing can only be fully explained by their acceptance of that implicit philosophy of the Common Law which regards the rights of private property as a sacred dogma beyond control by the legislature.<sup>4</sup> For they import into their discovery of legislative intentions not an assessment of the evil the statute was intended to remedy but an argument that no legislature would willingly attack even the noxious consequences of ownership. Their minds are unable to realize that the social service State of the twentieth century requires a technique of action different from that of the *laissez-faire* State of the nineteenth. And any one who compares the fate of

<sup>1</sup> Cf. my remarks in the *Report* cited in note 1, p. 120.

<sup>2</sup> F. Pollock, *Essays in Jurisprudence and Ethics*, p. 85.

<sup>3</sup> [1910] A.C. 87.

<sup>4</sup> Cf. the remarkable article by W. I. Jennings, 49 *Harvard Law Review* (1936), p. 426.



*Entick v. Carrington*<sup>1</sup> in the hands of Mr. Justice Horridge when he dealt with its consequences in *Pasmore v. Elias*<sup>2</sup> will, I think, be constrained to admit that an English judge is not less conscious than his American brethren of the social consequences of the decisions he makes. The principles of which he makes use are not a ballet of bloodless categories to be applied without regard to the end that is reached. They are weapons in a battle for the incidence of the State-power, to be used in one direction rather than another. In the realm of freedom of speech, for example, one judge, in one set of circumstances, will rely explicitly on *Beatty v. Gillbanks*;<sup>3</sup> but another judge, in another set of circumstances, will not fail to remember the immense potentialities of *Dunning v. Wise*.<sup>4</sup>

It has been said by Mr. Justice Cardozo in a classic book that the judge is bound, in reaching his decision, to pay regard to considerations of social welfare. Mr. Justice Holmes was even more emphatic. "I think," he wrote,<sup>5</sup> "that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage." But so to state their obligation is to state, I suggest, only half the problem. If the judge is to "weigh considerations of social advantage," whose advantage is it he is to weigh? And what are the tests he is to bring to the task he performs? In the last resort, no doubt, there is no answer to these questions save as he makes them by the light of his instructed conscience. Mr. Justice Cardozo, no doubt,

<sup>1</sup> [1765] 19 St. Tr. 1030.

<sup>2</sup> *Times Law Reports* (1933-4), p. 196.

<sup>3</sup> [1882] 9 Q.B.D. 308.

<sup>4</sup> [1902] I.K.B. 167.

<sup>5</sup> *The Nature of the Judicial Process* (1925), p. 134.

## THE JUDICIAL FUNCTION

would say that he does the best he can and, at the highest, with a full sense of the grave function he performs. That is true in many instances. But what remains, even when a full allowance has been made for judicial effort of this quality, is a certain logic in the stream of judicial decisions which makes their impact unified with the interpretation of the common welfare inherent in the ethos of the society's productive system. The essential postulates of judicial thinking rarely conflict with that ethos. There may be, as with some of Mr. Justice Holmes's decisions, a wider sense than is usual with the judiciary of the right to experiment with its possibilities.<sup>1</sup> There may even be, as in many of the judgments of Mr. Justice Brandeis, an inferential philosophy not easy to square with the minor premisses of the American political system in its historic outline.<sup>2</sup> What is, I think, of primary importance is the inescapable fact that the total result of the judicial process is never a basic contradiction of that conception of the common welfare which the State-power is there to enforce. Its general mental climate enfolds the judiciary within its atmosphere. As a judiciary, it is an instrument of the State-purpose. Its conception of the common welfare must move along the high-road the State is there to guard.

### IV

The realist view has seen something of this result; there has even been, from some of its representatives, an

<sup>1</sup> Cf. my *Studies in Law and Politics* (1932), p. 146 f.

<sup>2</sup> Cf. the brilliant discussion by Mr. Max Lerner, *Yale Law Journal* (1931), p. 1.

angry criticism of the degree to which it is a "political" rather than a "judicial" result. They have pointed out how often "natural justice" is merely a name of high sound to cloak the private prepossessions of a judge incapable of serious self-examination. They have recognized, too, that a judiciary can only, over a period, pass upon the constitutionality of statutes if it is prepared to adjust its attitude to what there is of long-time insistence in the public mood. They have seen, also, how "public policy" is mostly a dramatic screen behind which the judge secures an end he thinks desirable in the public interest.

I suggest, however, that the root of the agreement between the inherent purpose of the State and the large outlines of judicial doctrine lies in another direction. Its true source is to be found less in the scrutiny of the individual judge's mind than in the methods by which he is trained as a lawyer and promoted from the Bar to the Bench. What I have here to say has, of course, special application to the Anglo-American system; but I shall argue that the result is not different in continental systems, like those of France and Germany, where the judiciary is a civil service. My argument is the simple one that, as a practising lawyer, the successful career is dependent upon his ability to serve the interests which dominate the State. His reputation is a function of his capacity in that service. He becomes known as an advocate in cases where his clients accept the already-formed legal tradition which expresses the State's purpose. For the most part, he can only make a reputation by appearing for clients of this kind. To use the law to their detriment is to get the reputation of

an "unsound" man. But an "unsound" man is rarely, in this realm, a successful man; and an unsuccessful lawyer does not belong to the class from whom the judiciary is chosen.

Let us examine, from this angle, the appointments to the English Bench in the last century of its history.<sup>1</sup> It is notable, first, that, with but a single exception, every Lord Chancellor and Lord Chief Justice has been an eminent political figure; and at the present time the head of every English Court is, again with but a single exception since the War, an ex-Attorney-General of Great Britain. It is a recognized convention of the system that the Attorney-General has the right of refusal whenever a judicial vacancy occurs. More than this. In the last hundred years out of every three lawyers who have been appointed to the Bench two had been members of the House of Commons before appointment; and it is worth remarking that the average age of their appointment is less by several years than that of those who were appointed on legal eminence alone. The men, in short, who shape the essential outlines of the law in England are men who share political prepossessions which are, in their fundamental contours, the same. The uniformity of their outlook comes from the simple fact that, had they wide differences of view about matters of fundamental social constitution, they would not have reached the Bench.

Much the same is true, perhaps in an even more emphatic way, of the American judiciary. In those States where the judiciary is elective, most of the

<sup>1</sup> Cf. my *Studies in Law and Politics* (1932), p. 163 f.



## THE JUDICIAL FUNCTION

appointees are chosen by the political parties; that is already a guarantee that their views are regular. Where the method of appointment is gubernatorial nomination, political service to the party in office is a normal qualification; and where the appointee has stood apart from politics, he is usually a corporation lawyer who, even if distinguished, is pretty certain to share the general outlook of his clients. In the Federal realm, the majority of appointments has always been made on political grounds; and even where, as with Mr. Justice Holmes, the appointee has had no political affiliations, we possess a revealing correspondence between President (Theodore) Roosevelt and Senator Lodge in which the former makes careful inquiry into Mr. Justice Holmes's views upon the major political themes of the time.<sup>1</sup> But perhaps nothing has so strikingly demonstrated the anxiety of the interests in America to secure "sound" men on the Court as the long struggle over the nomination of Mr. Justice Brandeis by President Wilson.<sup>2</sup> The latter—now, admittedly, the most striking figure on the Court, and one of the half-dozen most distinguished figures in its history—had sinned in two ways. As a practising lawyer, he had been the emphatic defender of the legal rights of organized labour, and he had played perhaps the leading part in his generation in exposing financial malpractices by the great corporations. It is interesting that views which, if anything, were basically those of an advanced Jeffersonian should have been held by

<sup>1</sup> Correspondence of Henry Cabot Lodge (1925), Vol. I, p. 517.

<sup>2</sup> The Senate inquiry upon this appointment is an octavo volume of testimony over a thousand pages long.



## THE JUDICIAL FUNCTION

men of eminence like an ex-President of Harvard University to disqualify Mr. Justice Brandeis for membership of the Court. At the present time it contains, as a Court, only two men who have not held political office; the remainder have all played a leading part in the politics of their State or in the national arena.

Of the lower Federal judiciary this is perhaps less true; for there sit on the Circuit Courts and the District Courts a number of men of no political leanings or connexions. But, to balance this, two things must be said. Most appointments to these Courts are made by the President in consultation with the Senator of the State involved and, as a rule, they are an element in the general American system of political patronage. It is, moreover, broadly true that while almost any eminent American lawyer would accept appointment to the Supreme Court, by reason of the distinction so conferred, it is exceptional for a man in the front rank to accept appointment to the lower Courts. The remuneration is low compared with the earnings of a successful corporation lawyer; and the chance of promotion to the Supreme Court hardly exists. Neither the Circuit nor the District Court, therefore, is more likely to attract an outstanding lawyer than are the County Courts in Great Britain. With notable exceptions, appointment to them represents either reward for political service, or, more rarely, recognition of other qualities not sufficiently in the public eye to make a nomination to the Supreme Court seem indicated. Only once, indeed, in recent times has legal eminence alone elicited a widespread

public demand that a particular lawyer be appointed to the Supreme Court; that was when, in 1932, Mr. Justice Cardozo succeeded to the place left vacant by the resignation of Mr. Justice Holmes.

Any one who considers this technique of training and appointment can hardly fail to draw certain inferences from it. Men who undergo an education in the law of which the broad postulates rarely question the foundations of the existing order; whose access to the successful practice of their profession is largely dependent upon the good opinion of business men who themselves never doubt those foundations and are suspicious of those who do; whose appointment to the Bench is either, as where the system of election prevails, mainly in the hands of political parties which exist to protect those foundations, or in the discretion of a President or Prime Minister who is, with rare exceptions, himself the nominee of one of those parties; who, after appointment to the Bench, are involved in a system in which their willingness, if they possess it, to innovate on any large scale, is controlled in part by the positive limitations of statute and in part by the subtler inhibitions of precedent and professional tradition; who, in the upper hierarchy of the Courts, will find that the range of appeal is predominantly confined to men rich enough to afford this luxury, at least outside the sphere of criminal cases; is it surprising that a technique of this kind should produce a general uniformity of approach to the interpretation of law? Ideas are, after all, in large degree the outcome of experience, and where the nature of the legal profession, and its relationships, makes experience so similar in nature,

## THE JUDICIAL FUNCTION

a general similarity of outlook is the natural and consequential result. Looking indeed at the process as a whole, the wonder is that the *rationes decidendi* of judicial decisions are as varied as they are. Certainly, on intellectual grounds, there is nothing that would lead one to expect from the average judge any wide departure from traditional views.

Nor should the continental systems, where the judiciary is, effectively, a civil service, lead to any different result.<sup>1</sup> For not only is the lawyer who enters it trained to the acceptance of the tradition. The salary scheme of the system, especially in the first years of service, makes it probable that he will come from a class which lives independently of the remuneration attached to lower judicial office; and normal promotion will follow from the cultivation of exactly the same qualities and habits as secure success in the Anglo-American tradition. It appears probable, indeed, that the French or German judge feels himself somewhat more emphatically the servant of the State than his British or American colleague. For his membership of the judicial civil service until he reaches the highest Courts is much more compatible with political relationships than it is in either England or the United States; and promotion is at least as much a function of them as it is of legal distinction merely. One has only to note the ease with which legal officials in France and pre-Hitler Germany passed from purely legal functions to important political office to realize the significance of the relation. The judge as an

<sup>1</sup> Cf. the admirable volume of Mr. R. C. K. Ensor, *Courts and Judges* (1933).

## THE JUDICIAL FUNCTION

instrument of the State is far more nearly associated with the direct enforcement of its will, the protection, that is, of the ultimate and inherent purposes it exists to express, in the French or German systems, than he is under the Anglo-American dispensation.

The uniformity of outlook necessary if the judicial function is to be performed in a manner which protects the State-purpose is secured by even more drastic provisions than elsewhere in Hitlerite Germany. In the democratic countries, as I have sought to show, the outlook required is partly the result of sharing a similar tradition and experience, and partly the result of choosing men whose views, in all fundamental matters, are likely to prove satisfactory to the powers that be. The new Germany has not been satisfied with these guarantees. Legal training is confined to persons whose origin and outlook is deemed satisfactory by the authorities. It is accompanied by political instruction intended to assure that the lawyer accepts the views on matters of social constitution which have been advanced by the party in power. The judge is instructed that in his decisions he must conform to the principles of National Socialism. To act otherwise, writes Professor Carl Schmitt, perhaps the highest legal authority on the new spirit, "would be a subjectively arbitrary procedure and a political act directed against the State. It would endanger and destroy the condition precedent and foundation of judicial independence, and the subordination of the judge to the enacted law."<sup>1</sup> When this is read in the context of General

<sup>1</sup> For the material on this subject I am indebted to the admirable report of the Haldane Club, *Bench and Bar in Nazi Germany* (1936).



## THE JUDICIAL FUNCTION

Goering's announcement to the Public Prosecutors of Prussia that "the law and the will of the Führer are one"; or of the Act of June 28, 1935, which frees the judge from dependence on precedent if this should conflict with the philosophy of National Socialism; or of the Act of October 16, 1934, which decides that all questions of equity shall be determined in accordance with that philosophy; or of the provision that in the application of the Criminal Code not only an offence specifically alleged and proved shall result in punishment, but also the commission of an act which "deserves punishment" if so regarded "by sound public sentiment"—where the latter, once more, means the "principles of National Socialism"; where, again, officials of the National Socialist party sit with judges, if they think fit *in camera*, in the People's Court, with no right of appeal therefrom; where, finally, the legal adviser (who was not himself a Communist) of the Communist leader, Herr Thaelmann, can be disbarred for organizing the defence of a client not yet brought to trial, and the legal adviser of Professor Dessauer, a member of the Centre Party, can be disbarred for securing his client's acquittal by the Courts; it is surely obvious that the new German system has taken not wholly inadequate precautions to see that both lawyer and judge are instruments of the State. Certainly the degree to which the judge can depart from the purpose announced by the State seems in these circumstances to be small.

Englishmen and Americans are likely to be shocked by provisions destroying judicial independence and impartiality so naked in their purpose as these. It is



yet important for them to realize the logic which lies behind the German view. In its naked essence, every State is ultimately a coercive organization; the difference between a democratic State and a dictatorial is the difference between the ability in the one to use, in a large degree, the forms of free consent to the State-purpose, and the need, in the other, to discipline the citizen-body to this end. The Anglo-American system relies upon the first; the German relies upon the second. But the Anglo-American system uses the method of free consent, so far as the judicial function is concerned, because it knows that, *a priori*, there is small likelihood of any refusal to accept the State-purpose. The German system has no such assurance. It is therefore compelled to bring into the foreground those coercive sanctions which, in the Anglo-American world, can be more gracefully concealed. The German method achieves by brute force a coincidence of view that in Great Britain and America is accomplished by deep-rooted traditions that the judiciary has rarely sought fundamentally to challenge.

That, at bottom, this is the case the experience of the United States interestingly reveals. The power of the Supreme Court over the Constitution is so wide that its conflicts with both the executive and the legislature can assume major proportions in a crisis. Where such a division of opinion occurs, the pressure for change has assumed striking forms. Judges have been impeached. The jurisdiction of the Court has been changed by Act of Congress. The number of the judges has been altered so as to obtain a majority for a particular point of view. Constitutional amendment has over-

ridden the judicial finding. As vacancies have occurred, care has been taken to appoint new members with the right opinions. A President of the United States has even refused to implement the judicial decision by executive action; and another has even urged the desirability—which in fact exists in some States of the Union—of judicial recall. In the last four years, the notable conflict between the Supreme Court and the Roosevelt experiment has even led some enthusiasts to urge that a constitutional amendment should protect Congressional legislation from invasion by the Courts; while others have argued that such legislation—perhaps even that of the States—should be unconstitutional only where there is an emphatic majority for this attitude.

There is, surely, involved in this view the theory that the judicial will must subordinate itself to the purpose the State declares, so long as the latter, through its legislative branch, persists in this purpose. The judge is, in fact, its instrument, and his power to depart from it will always be limited both in time and in space. That is why revolutionary epochs have always been associated with hostility to the judiciary; for the mind of the judiciary is always bent to a service the revolution has come to change. At bottom, the judicial function is a political one. It seeks to protect the State-purpose from invasion. Thereby, it is bound, from its nature, to look to the past rather than to the future; its members cannot prepare the ground for new forms of social organization which depart at all radically from the central tradition. And judges, as Mr. Justice Holmes has pointed out,<sup>1</sup> tend in any case to be elderly

<sup>1</sup> *Collected Papers*, p. 295.

## THE JUDICIAL FUNCTION

men who do not easily welcome innovations to which they are unaccustomed. By the time they reach positions of judicial authority they are unlikely to depart at all widely from the groove in which earlier years have set their opinions. Mr. Justice Miller has told us how difficult, in his experience, it was for lawyers who had been counsel for railroad interests to forget, when they reached the Bench, that this affiliation had ceased.<sup>1</sup> But below a simple illustration of this kind there lies the deeper truth that what Mr. Justice Holmes has termed the "inarticulate major premisses" of the judiciary are toughly resistant to new ideas.

### V

What conclusions emerge from this discussion? The essence of the judicial function, I have argued, is to give a logical form to conclusions which already flow, in their large outline, from the nature of any given State. The judge, no doubt, has a certain elbow-room within this outline; but the degree of his movement is always severely limited by it. That limitation, moreover, is further emphasized by two things. It is emphasized, in the first place, by the legal tradition of any given State; and a large part of that legal tradition is shaped by the character of the training and experience in which lawyers participate and the method of their selection for judicial appointment. Courts, in the second place, must in the long run adapt themselves to the permanent purpose any State embodies; a

<sup>1</sup> Cf. the article on his opinions by Professor Fairman, *Political Science Quarterly*, Vol. 50, p. 15.

## THE JUDICIAL FUNCTION

failure to do so will always be followed by a forcible reconstruction from without to secure this adaptation. It is a mistake, therefore, in studies of the judicial function to concentrate attention on the unpredictability of judicial decisions. There may be doubt in particular instances. There will, normally, be no doubt about the constant direction of the law so long as there is no doubt about the end the State-power is seeking to serve.

Every State, moreover, is mainly determined as to its direction by the class-relationship of the society over which it presides. Those relations, in their turn, are determined by the way in which the instruments of production are owned in the particular society. Law being the expression of what in those relations the State has decided to protect from invasion, the judicial function is predominantly the discovery and enforcement of the implications of that protection. It follows that judicial notions of the common welfare are necessarily framed by the logical context of those implications. Any wide departure from them by the judiciary would either be corrected by the sovereign authority of the State or would indicate a decision on the part of that authority to alter the ends to which it devoted the exercise of its power.

## CHAPTER V

### *The English Constitution and French Public Opinion, 1789-1794*

#### I

FRENCH interest in the English Constitution was remarkable during the eighteenth century. In part, no doubt, this was the outcome of the rapid rise of discontent with the ancient régime in the latter years of Louis XIV; the sense of dissatisfaction with their institutions made many turn with envious eyes to a country which had seemed to solve so many of the problems of civil liberty which they themselves had only begun to pose as problems. In part, also, it was due to the work of the numerous exiles who left France after the Revocation. They contributed in a remarkable degree to an understanding of English life and habits such as previous Frenchmen had rarely possessed. One has only to compare the accounts available in seventeenth-century France with those available, in increasing numbers, after 1700 to realize how different in quality were the materials for understanding. It is hardly too much to say that the England of Walpole impressed itself upon the France of the *philosophes* with something of the pungent excitement of a new civilization.

That does not mean that, before 1789, Frenchmen bowed down in abject worship of English institutions. Eulogy, indeed, there was in abundance; Voltaire and



Montesquieu are only the greatest names in a chorus of praise. That neither fully grasped their nature was, perhaps, less important than the fact that they lent the immense weight of their authority to the wide belief that Englishmen enjoyed civil liberty, and that this happy condition was the result of the English Constitution. Criticism goes through several phases. Before the Seven Years' War it was episodic and fragmentary. Père Castel thinks Montesquieu "trop et tout anglican"<sup>1</sup>; Véron de Forbonnais dislikes the separation of powers and is already unfavourably impressed by the evidence of electoral corruption. He denies the reality of religious toleration and doubts whether juries are sufficiently enlightened to do justice.<sup>2</sup> The President Lavie—an able but neglected thinker—dislikes the royal veto in particular and thinks that, in general, the powers of the Crown might easily become a road to despotism in the hands of an ambitious King.<sup>3</sup> But it is Voltaire who tells us that Montesquieu's praise of the English Constitution is that which, in his book, most pleased Frenchmen; and it is the Encyclopaedia which, through the pen of Jaucourt, tells us to regard Parliament as the "most august senate in Europe." "All Europe," wrote Lavie in 1755,<sup>4</sup> "admires and perhaps a part of it envies the English Constitution."

After the outbreak of the Seven Years' War criticisms, naturally enough, begin to multiply. England is out of fashion; a writer like Fougere de Montbron can find

<sup>1</sup> *L'Homme Moral* (1756), p. 104.

<sup>2</sup> "Du Gouvernement d'Angleterre" in *Opuscules de M. F. (Véron)*, pp. 170–225.

<sup>3</sup> *Abrégé de la République de Bodin* (1755), esp. p. 317.

<sup>4</sup> *Ibid.*, I, 308.

a ready audience for his *Préservatif contre l'anglomanie*. Poems, essays, pamphlets, against England then abound; and Chais' translation of Brown's gloomy *Estimate* had a big sale.<sup>1</sup> A public could even be found for the ten curious volumes in which Genet gave massive extracts from English writers to prove that the downfall of the "modern Carthage" was at hand.<sup>2</sup> Something, too, may perhaps be attributed to Rousseau's unfavourable verdict; though here we must remember that, of all his major works, the *Social Contract* had in its early years the least influence.<sup>3</sup>

And after the conclusion of the war, regard for the English Constitution took on a new lease of life. Every one knows Gibbon's stately satisfaction at the high regard he found in French drawing-rooms: England is *clarum et venerabile nomen gentibus*.<sup>4</sup> Lefèvre de Beauvray can hardly contain his indignation at the passion for things English;<sup>5</sup> and that forgotten genius, Linguet—one of the most remarkable of Marx's precursors—though he wrote an able criticism of the English Constitution, was yet constrained to admit that his fellow-citizens regarded the average Englishman as "rich, enlightened, generous, brave and free."<sup>6</sup> From that acrid temperament this is eulogy indeed. It was

<sup>1</sup> The translation appeared in 1758.

<sup>2</sup> *Lettres sur les Écrits Publics de la nation anglaise* (1757–1759), 10 volumes.

<sup>3</sup> It is, indeed, not until after his death that the *Social Contract* begins to be seen at its real importance. M. Mornet found a copy in one only of the 500 libraries he has catalogued (*Revue d'Histoire Littéraire*, 1910).

<sup>4</sup> *Autobiography* (ed. of 1897), p. 260.

<sup>5</sup> *Dictionnaire Social et Patriotique* (1770) and compare his *Adresse à la Nation Anglaise* (1757).

<sup>6</sup> *Annales*, I, 75.

not for nothing that the *Lettres sur les Anglais* of the abbé Leblanc should have been found by M. Mornet in 96 of the private libraries whose contents he was able to survey.<sup>1</sup>

There is little doubt but that from the Seven Years' War to the opening of the Revolution discussion, and largely eulogy, of the English Constitution was in the fashion; the popularity of English visitors, Horace Walpole, Wilkes, Hume, Sir John Sinclair, may account for some of this. No less important, however, we may assume, was the growing breakdown of French institutions. "I would rather," wrote Mlle de Lespinasse,<sup>2</sup> be the last member of the House of Commons than King of Prussia." Holbach may have dissented<sup>3</sup>; but that eminent lawyer Elie de Beaumont, after a long conversation with the elder Pitt, has no doubt of its excellence. Nor, with some passing criticism, has the Duc de Croy<sup>4</sup>; and Helvetius emphasizes his conviction that English advantages over France are due solely to the form of government; "the parliamentary system," he writes,<sup>5</sup> "has the happy result of bringing enlightened men to the control of government." Nor is it unimportant that so widely-read a writer as Grosley can feel not only that the English Constitution has found the happy medium between slavery and anarchy, but also that—a significant remark—it gives, with fiscal equality, religious toleration and respect for property, its proper place in the State to the bourgeoisie."<sup>6</sup> And

<sup>1</sup> See note 7, p. 28, supra.

<sup>2</sup> *Lettres* (ed. Asse), p. 151.

<sup>3</sup> Cf. Wickwar, *The Baron d'Holbach* (1936, George Allen & Unwin).

<sup>4</sup> *Revue Britannique* (1895), p. 17.

<sup>5</sup> Letter to Hume, April 1, 1795.

<sup>6</sup> *Londres* (1770).

the abbé Coyer, who, it is true, tended to see all Englishmen through rose-coloured spectacles, had no doubt that their virtues were the outcome of their constitution.<sup>1</sup>

Once more, I note that all is not eulogy in these years. French sympathy for the American cause, after 1774, re-awakened the critical note. Blackstone is found too eulogistic<sup>2</sup>; account is taken of electoral corruption, the faction of parties, the excessive duration of Parliament.<sup>3</sup> The system of criminal justice may be praised, but episcopal docility and mob-violence are noted.<sup>4</sup> The weakness of the royal power may find favour; but the complexity of the system awakens reproof.<sup>5</sup> Among the critics, too, are well-known names, Target,<sup>6</sup> for instance, Linguet<sup>7</sup> and the Physiocrats;<sup>8</sup> for the latter, the separation of powers, in the assumed English fashion, was the denial of the central principle of political wisdom.<sup>9</sup> Le Trosne thought English political liberty an illusion;<sup>10</sup> Turgot thought the Americans had excessively imitated the English system;<sup>11</sup> and Mably thought Englishmen destined to be the passive slaves of the Court since the supremacy of the

<sup>1</sup> *Nouvelles Observations sur l'Angleterre* (1779).

<sup>2</sup> *Journal Encyclopédique*, June 1st, 1775.

<sup>3</sup> Ibid.

<sup>4</sup> *L'Observateur Français* (1769).

<sup>5</sup> Ibid., and cf. *Journal Anglais* (1775-1776), Vol. 1, 361.

<sup>6</sup> *Les États Généraux*.

<sup>7</sup> *La France plus qu'Anglaise* (1788) and the *Annales*, cf. *Théorie des Lois Civiles* (1767), 1, 294, and *Lettres sur la Théorie* (1770), passim.

<sup>8</sup> Cf. Dupont de Nemours in *Ephémérides* (1770), Vol. VI, p. 210 f. <sup>9</sup> M. de La Rivière, *Ordre Naturel*, XXI, p. 159.

<sup>10</sup> *Ordre Social*, Ch. VI.

<sup>11</sup> Letter to Dr. Price in Mirabeau, *Considérations sur l'Ordre de Cincinnati*, p. 190.



executive threatened the delicate equilibrium of the whole edifice.<sup>1</sup> Yet, in general, it is, I think, fair to say that the eulogies outweigh, both in volume and quality, the criticisms upon the system. After he has resumed all these, Raynal, at the height of his meretricious popularity, can conclude that no Constitution "has ever been better organized" than the English.<sup>2</sup> The average Frenchman had a profound sense that England was, as Voltaire so often insisted, "the temple of liberty."<sup>3</sup> The Parliament of Paris can say in 1776 that "England is the country which freedom seems to have chosen for a refuge."<sup>4</sup> So, too, felt Madame Roland<sup>5</sup> and Sébastien Mercier.<sup>6</sup> If the English Constitution is not perfect, thought the younger Mirabeau,<sup>7</sup> "at least it is the best known anywhere." And there are few instructed Frenchmen of the time who would not have echoed Lally-Tollendal's grave eulogy of the English criminal law.<sup>8</sup>

This long prelude is necessary to the argument that is to follow. I have sought to show how widespread was the interest in the English Constitution and how eager in general were observers of significance to recognize in its qualities the secret of freedom. That there was criticism, even profound criticism, is true; and it is important that the main periods of criticism coincide with the epochs of war between England and France.

<sup>1</sup> *Œuvres* (1789), Vol. VIII, p. 60.

<sup>2</sup> *Histoire des deux Indes*.

<sup>3</sup> *Œuvres* (Moland), Vol. 37, p. 388.

<sup>4</sup> *Remontrances du Parlement de Paris*, III, 319.

<sup>5</sup> *Lettres* (ed. Perrouet), II, 6.      <sup>6</sup> *L'An 2440*, II, 108, 127.

<sup>7</sup> *Lettres à Chamfort*, October 13, 1784.

<sup>8</sup> *Essai sur quelques changements* (1786), p. 65.



It is important, too, that the critics fastened upon what were, in fact, the main defects of the English system: the power of the Crown, party corruption, and the inadequate methods of electoral representation. They saw that the influence of the aristocracy was very great; they recognized that religious tolerance was far from complete. They even suspected that the careful equipoise of the English scheme was a powerful barrier against popular power. But, in general, they compared the arbitrary authority of France with the freedom in politics enjoyed by the English people overwhelmingly to the latter's advantage. In a choice between discretion and the rule of law, they had no doubt where freedom lay. The ruling intelligence of France in 1789 was not only prepared for a constitution. It is not, I think, too much to say that it was prepared for a constitution on the English model.

## II

That is not what occurred; and my main purpose is to try and show why it did not occur. When the drama of the Revolution began, some of the ablest members of the States-General were the enthusiastic protagonists of such a scheme. They were well informed; they were even well organized; and they fought hard to achieve their purpose. Yet by the autumn of 1789 it was clear that they had lost all hope of success. Thereafter the prospect of any such achievement as they desired grew rapidly more remote. The more the Revolution became intensified, the more obvious it became that they were speaking only

to themselves. One by one they disappeared, embittered and disappointed, from the scene. By the declaration of war there was scarcely a trace of their enthusiasm. By the time that the Jacobins had arrived at power, the profession of enthusiasm for English institutions was almost equivalent to the expression of counter-revolutionary sentiments. What currents of thought contributed to so rapid and so resounding a defeat?

There is no doubt of the early enthusiasm. "Men spoke more," wrote Madame de Staël,<sup>1</sup> "of the British Constitution than of the French." As early as July of 1789 Mounier recalled the "excessive admiration" for the English Constitution.<sup>2</sup> The Czar's correspondent in Paris told his master that opinion had fixed itself on the English model as one that "made men free."<sup>3</sup> So thought, also, Roederer<sup>4</sup> and that detached American, Gouverneur Morris.<sup>5</sup> Even the critics of British institutions admit the strength of this view. It is, writes one opponent,<sup>6</sup> "the mania of the day." Men think of it, another tells us, as the "chief product of human powers." "Every Frenchman," wrote Siéyès ironically,<sup>7</sup> "is mocked at unless he bows down before the English Constitution."

The admiration extended to unexpected quarters. It had significant supporters among the aristocracy. Brienne and Calonne were anxious to adapt the

<sup>1</sup> *Considérations sur la Révolution Française*, Chapter IX.

<sup>2</sup> *Considérations sur le gouvernement*, p. 12.

<sup>3</sup> *Corresp. secrète* (ed.), Lescure, II, 243.

<sup>4</sup> *Esprit de la Révolution*, p. 57.

<sup>5</sup> March 3, 1789. *Diary* (ed. of 1939), I, xxxix.

<sup>6</sup> *L'Anglais à Paris*, p. 3.

<sup>7</sup> *Qu'est ce que le Tiers État?* p. 64.

English plan to French ideas.<sup>1</sup> Ségur tells us that the young nobles piqued themselves on their hope of playing their part like English peers<sup>2</sup>; and the Duc de Lévis gives us a picture of them practising their oratory at masonic meetings.<sup>3</sup> The higher clergy, at least in part, shared these views. The Archbishop of Bordeaux, Champion de Cicé, was an English enthusiast<sup>4</sup>; so, also, were the Bishops of Langres and Aix; the latter was a profound admirer of Fox and spoke in almost lyrical terms of Montesquieu's analysis of the British Constitution.<sup>5</sup>

It is, perhaps, less surprising to find a similar feeling in administrators like Necker<sup>6</sup> and members of the Parlements like Duval d'Esprémesnil.<sup>7</sup> Both had suffered from the consequences of royal arbitrariness. The latter, at least, had no doubt of what he wanted. "The right of the nation," he wrote,<sup>8</sup> "freely to vote its aids by a States-General regularly called and properly composed; the right of every citizen never to be taken before any judges save his natural judges who are those appointed by statute for this purpose; the right, without which all others are worthless, not to be arrested, by any authority whatsoever, without being tried at once by competent judges." These rights, he thinks, are elementary and fundamental.

We must not, of course, lay too much emphasis

<sup>1</sup> *Lettre adressé au Roi de 9 Février, 1789.*

<sup>2</sup> *Mémoires*, I, 139.

<sup>3</sup> *Souvenirs*, p. 317.

<sup>4</sup> Cf. Lévy-Schneider, *L'Application du Concordat* (1921).

<sup>5</sup> Lavaquery, *Le Cardinal de Boisgelen*, I, 319.

<sup>6</sup> *Hist. de la Rév. Française*, p. 168.

<sup>7</sup> Cf. J. N. Moreau, *Mes Souvenirs*, II, 416.

<sup>8</sup> *Remontrances* (ed. Flammarion), III, 746.

upon this enthusiasm; it touches only a fragment of the people. There is nothing about the English Constitution in the *Cahiers*; men like Mounier were aware how dangerous was any attempt at the simple importation of foreign institutions. "Do not let us copy them," he wrote,<sup>1</sup> "we shall only deceive ourselves." Others, like Moreau, thought that a Constitution on the English model could only be bought painfully by civil war;<sup>2</sup> it would, thought the Comte d'Entraigue, lead to "inevitable ruin"; Linguet saw in it the source of conflicts which would make the *robins* the masters of the State.<sup>3</sup>

These are conservative critics. More important, perhaps, are the doubts of those who were dissatisfied with the illiberality of the English Constitution. Target pointed out that the state of representation in the House of Commons "aroused universal protest."<sup>4</sup> Le Franc thought the House of Lords a wholly evil institution; "it existed only to flatter the great and their vanity."<sup>5</sup> The famous attack of Siéyès is well known.<sup>6</sup> Englishmen themselves thought their system of representation "rotten to the core." Only its geographical situation, which saved England from the need of a great army, prevented the predominance of the executive. The House of Lords was incompatible with the principle of national sovereignty. The English Constitution, he argued, was essentially the product

<sup>1</sup> *Accord de la Monarchie*, p. 197.

<sup>2</sup> *Exposition et Défense*, II, 213.

<sup>3</sup> *La France plus qu'Anglaise*, p. 123.

<sup>4</sup> *Les États Généraux*, p. 26.

<sup>5</sup> *Dialogues entre un Français et un Anglais*, p. 147.

<sup>6</sup> Note 7, p. 32, *supra*.

of the seventeenth century; it would be curious indeed if a hundred years of further enlightenment did not permit of a finer product of the political art.

The pamphlets, one may argue, represent the views of that conscious minority eager to influence their fellows. They must be read in the perspective of the *Cahiers*. These, I suggest, forecast the disaster which was to fall on the adherents of an English model in two ways. On the one hand, they are completely silent upon the English Constitution; evidently enthusiasm for its principles was not very obviously in the minds of those who drew them up. And, secondly, in so far as they refer at all to constitutional arrangements, they favour, with but a handful of exceptions, the idea of a single chamber system. Rennes, extra-mural Paris, opposite it from the Third Estate. The noblemen of Touraine and Anjou think similarly. To propose an upper chamber, still more to sit in it, thought the nobility of Blois, would be to act as "traitors to our country." Neither on the legislative power nor on the royal authority is there anything, to my knowledge,<sup>1</sup> which suggests the influence of England. Only in questions of criminal procedure, with their emphasis on Habeas Corpus and trial by jury, the right to counsel and a public trial, can it be said that the example of England was important. The authors of the *Cahiers* wanted, we may suppose, civil liberty and constitutional government. They had no precise views of the ways in which these could be attained.

<sup>1</sup> Nor can I find any mention in the standard summaries. Perhaps the process of impeachment suggested by the Tiers Etat of Nemours is English in origin. *Archives Parlementaires*, IV, 162.



Yet as soon as the States-General transformed itself into a National Assembly the Anglophil party became a powerful force there. It had distinguished men in its service. Necker lent it his aid. It had three Archbishops and four bishops among its numbers. Lally-Tollendal represented the more liberal part of the aristocracy. Bergasse, Mounier and Malouet were, in the first two months of the Revolution, among the best-known members of the Third Estate. The party had great prestige, for some of its leading figures had been foremost in demanding the union of the three estates and Mounier, in particular, had initiated the Oath of the Tennis Court. Malouet has told us of the care with which they organized their plans.<sup>1</sup> A central committee of fifteen, with a number of sub-committees, rapidly secured the support of more than three hundred deputies. They had a majority in the Committee on the Constitution chosen by the Assembly on July 14th; of eight members, five were their own leaders, and Mounier, as its reporter, had necessarily a special authority.<sup>2</sup> It is, however, important to note that the minority was composed of Talleyrand, Le Chapelier and Siéyès. I do not need to emphasize that this was a formidable combination.

Any one who examines the work of this Committee will see at once the influence of the English example.<sup>3</sup> Mounier told the Assembly forthrightly that "one cannot organize with any perfection a monarchical government save on the English model."<sup>4</sup> Champion

<sup>1</sup> *Mémoires*, I, 339.

<sup>2</sup> Cf. Lanzaç de Laborie, *Mounier* (1887).

<sup>3</sup> *Archives Parlementaires*, XIX.

<sup>4</sup> *Ibid.*, VIII, 415.

de Ciccé's report on the Committee's preliminary work invokes the English Constitution as the ground for having a bicameral system.<sup>1</sup> Bergasse, in his report on the judicial power, says with emphasis that the Anglo-American criminal law is the sole law that is at once "human" and "profoundly related to liberty."<sup>2</sup> Lally-Tollendal, in his report on the legislative power, compares the political inexperience of the French "with the centuries of English thought and experience." These, he urges,<sup>3</sup> have made the English the nation which best understands the science of government.

It is easy to see that the central principles of these reports were deeply influenced by England. For Bergasse, the jury, a public indictment and trial, and the right of the defendant to counsel are essential.<sup>4</sup> The King, says Lally-Tollendal, is an "integral part of the legislative power." His person is inviolable. He is to be the fountain of honour, and the source of pardons; he is to have the exclusive right of making treaties and appointing and receiving ambassadors; the making of war and the conclusion of peace are in his hands. Though the two Chambers are to assemble of their own right on each first of May, and to sit for four months, the right of subsequent prorogation, as in England, is a prerogative of the monarch. He has the power to dissolve the lower House and to refuse his consent to legislation; even the formula of refusal is that of England. The Senate is to consist of members nominated for life; and the House of Lords is invoked

<sup>1</sup> *Archives Parlementaires*, VIII, 282.

<sup>2</sup> *Ibid.*, VIII, 444.

<sup>3</sup> *Ibid.*, VIII, 518.

<sup>4</sup> *Ibid.*, VIII, 443.

by Lally-Tollendal as the justification of this method. So, also, with the conditions governing election to the lower chamber and to the procedure by which Bills reach the statute-book. It is true that the executive is refused the right to membership of the chamber; this, I think, is the outcome of Montesquieu's famous misunderstanding of the English system. But the responsibility of ministers is enforced by an exact copy of impeachment; and where there is disagreement between the different branches of government, the method of conference suggested obviously derives from the English system of discussion between the two chambers.<sup>1</sup>

This, in broad outline, was the programme proposed by the Anglophil party. It was a conscious adaptation; and its protagonists, both inside and outside the Assembly, were proud to admit this was the case. Better, Lally-Tollendal told it, to have a century's solid experience of peace and liberty than metaphysical subtleties.<sup>2</sup> The English model, wrote Mallet du Pan,<sup>3</sup> "has behind it . . . a century of national blessings, a century of success which has given every Englishman a superstitious veneration for his laws." Rivarol, writing when this programme had already been defeated, criticizes its opponents for having deserted the path of safety; salvation, he thought, depended upon an imitation of England.<sup>4</sup> That was the view, also, of Cerutti<sup>5</sup> and of Servan.<sup>6</sup>

<sup>1</sup> *Archives Parlementaires*, IX, 525.

<sup>2</sup> *Ibid.*, VIII, 518.

<sup>3</sup> *Journal . . . de Genève*, September 26, 1789.

<sup>4</sup> *Journal Politique et National*, 1st series, Nos. 3 and 8.

<sup>5</sup> *Vues générales sur la Constitution Française*.

<sup>6</sup> *Lettres aux Commettants du Comte de Mirabeau*.

But criticism, both moderate and extreme, developed at once. Mirabeau did not deny the merits of the English Constitution; he favoured the royal veto and expressed his contempt for the theorists who did not recognize the virtues which had given England a century of happiness and tranquillity. But he was against an upper chamber which seemed to him "the constitutional refuge of the aristocracy and the preservation of the feudal system."<sup>1</sup> Blin, the able deputy of the Third Estate from Nantes was more thorough-going. He thought the accounts of Montesquieu and De Lolme "mere romances."<sup>2</sup> Another deputy thought the English people had civil but not political liberty. He agreed with Rousseau in believing that the English were deceived in thinking themselves free.<sup>3</sup> The abbé Grégoire, Alexander de Lameth, De la Reveillère de Lepeaux, all attacked the British system with more or less pungency.<sup>4</sup> So, too, did Rabaut de Saint-Etienne and Barnave. "The English Constitution," said the latter,<sup>5</sup> bears on its face the mark of a capitulation between enemies.

The grounds of criticism are various. Sometimes it is the peerage; sometimes it is corruption; sometimes it is the press of seamen and imprisonment for debt; sometimes it is the royal prerogative of creating peers. One critic, in a powerful denunciation,<sup>6</sup> insists that the system gives the people no effective power to

<sup>1</sup> *Simplicité de l'idée d'une constitution* and cf. Le Hodey, *Journal des États Généraux*, III, 393.

<sup>2</sup> *Lettre à Mounier*, p. 25.

<sup>3</sup> *Opinion de M. Salle*, p. 27.

<sup>4</sup> *Archives Parlementaires*, VIII. All these speeches were separately printed.

<sup>5</sup> *Ibid.*, VIII, 552.

<sup>6</sup> *Réflexions sur la Constitution Anglaise*.



resist despotism. Marat, who knew England from first-hand experience, argued that the English Constitution made the legislature the King's creature through his power over the disposal of patronage.<sup>1</sup> Brissot warned the public that neither national representation nor triennial parliaments were possible in England; conflicts between executive and legislature were only avoided because the King knew how to manipulate the latter.<sup>2</sup> Prudhomme found nothing in the English Constitution for Frenchmen to imitate save the jury system and freedom of the press. On September 10, 1789, the Assembly voted for single chamber government by 849 votes against 89; and on September 11th it preferred the suspensive to the absolute veto by 673 votes to 323. The next day, Mounier, Bergasse and Lally-Tollendal resigned from the Constitutional Committee. On the 15th September, the new Committee contained a strong majority against any Anglicizing proposals.

From that day, the advocates of an English system had no hope of victory. They won no support, as Necker tells us,<sup>3</sup> from Louis XVI. His extreme supporters expressed their contempt for those who would "reduce a King of France to the mean lot of a British monarch."<sup>4</sup> The more democratic members of the Assembly were hostile because they feared that an hereditary second chamber, and the royal veto, might provide a road back to a despotic system.<sup>5</sup> And

<sup>1</sup> *Chaines de l'Esclavage*, pp. 324-8.

<sup>2</sup> *Le Patriote Français*, September 9, 1789.

<sup>3</sup> *Dernières Vues*, p. 329.

<sup>4</sup> *Ibid.*

<sup>5</sup> Lameth, *Histoire de l'Assemblée Constituante*, p. 124.



the pace of the Revolution was moving too quickly for the Anglophils after their defeat in September. Men began to hope that they could build a better model than England: "Let us have the glory," wrote Cerutti<sup>1</sup>—until September an advocate of English principles—"of building a Constitution which makes the English in their turn our disciples and imitators." We hear at large of the errors and ignorance of De Lolme, of the sycophancy of Blackstone.<sup>2</sup> By the summer of 1790, not only has the English Constitution become "bad at the roots," but Mounier, Bergasse and Lally-Tollendal have quitted the political scene. By October of that year, Mallet du Pan accused the Assembly of having "destroyed the party of constitutional moderation."<sup>3</sup>

Other influences combined to deepen the defeat. The publication of Burke's *Reflections* may have heartened the royalist party; it also, undoubtedly, intensified the sense that there was no unified enthusiasm in Great Britain itself for his principles. The growing abyss between the Court and the Assembly only made suspicion of an English model more profound. After 1790, the eulogists of England are only repeating their earlier arguments without any serious prospect of an effective audience. Lameth, Dupont, even Lafayette, had ceased to influence these problems: Necker was already half forgotten. Men listen to the able attack of Caze—perhaps the first pamphlet of the Revolution which shows a realistic insight into the

<sup>1</sup> *La Feuille Villageoise*, January 6, 1791.

<sup>2</sup> *Observations sur le gouvernement de l'Angleterre* (1791).

<sup>3</sup> *Mémoires*, p. 137.

working of the Constitution in England.<sup>1</sup> Lanthenas translated Paine's *Rights of Man*, and the latter became one of the heroes of the Constituent Assembly. Then came the slow drift to war. Once it had been proclaimed, support of English principles was no longer a feasible attitude.

How largely it had vanished is shown by a discussion, initiated on the proposal of Robespierre, which took place at six different sessions of the Jacobin Club between the 12th and the 30th January, 1794; its subject—the crimes of the British Government and the vices of the British Constitution—is alone significant. Careful speeches were made, and their publication voted; offers to translate them into English that they might be used to instruct an inferior nation in its rights were warmly applauded. The debates show decisively the new atmosphere. Le Pelletier regretted that a false appearance of liberty had led the *philosophes* astray. Laveaux argued that the “mixed system” meant the thread of discord and anarchy. English history was held to demonstrate that monarchy and liberty are incompatible. Experience, the Society was told, no matter how ancient, was meaningless “before eternal principles of reason and the rights of humanity.” Couthon thought that judged by the criteria of liberty and equality, England had a “monstrous Constitution.” It favours the rich and the powerful; it does not represent the national will; it does not concern itself with the rights of the people; it is “worse than direct tyranny.” But perhaps the final condemnation was

<sup>1</sup> *Comparaison des constitutions de la Grande Bretagne et de la France* (1792).

pronounced by Robespierre himself. Enthusiasm for English principles, he told the Society, masks itself insidiously as philanthropy just as "the old Bussolisme neglected the happiness and tranquillity of our country to busy itself with the freedom of Belgium." It was a grave warning. No Frenchman of 1794, least of all at the Jacobin Club, was likely to risk the accusation of Girondin opinions; that road might too readily lead to the scaffold. After 1794 there is only an occasional word to be heard on the theme; and either it is promptly defeated, or it comes as a faint voice from the emigrants. It was not until the return of Louis XVIII that British principles found once more the prospect of sympathetic examination.

### III

What explains this remarkable change? The century, as I have sought to show, begins with an interest in the English Constitution which burgeons rapidly into widespread enthusiasm; if it has its vicissitudes, on the whole, enthusiasm predominates. At the commencement of the Revolution, the enthusiasm revives, and it has behind it the best-known names of the National Assembly. Yet within two months it is on the defensive; within four months it has suffered a major defeat from which it never recovers. After the vote of September, it is a negligible quantity in French opinion. By 1791, except in the field of criminal procedure, it can hardly be detected; and by 1792 it becomes dangerous to express any enthusiasm for English principles. Thenceforward, until the defeat of Napoleon, English parlia-

mentarism finds no echo of favour in French eyes. It is almost as though the discussion of the previous fifty years had been devoid of meaning.

The answer, I think, is clear, though it is a complex one. The advocates of an English model were, throughout, an intellectual élite who, however sincere, had no basis of support in mass-opinion outside. They converted one another; they did not convert the great public beyond their group. The very tempo of the Revolution, moreover, made their opinions suspect. Not only were they themselves either members of the nobility or of the professional bourgeoisie; they were in the impossible position of moderates fighting between extreme parties. They never had the support of the King; the reactionaries regarded their views as excessively liberal. They were defending the veto of a monarch early under mass-suspicion. They were defending an upper chamber to which men would go whose main purpose would be the defeat of ends which, very early, the Revolution conceived itself as sowing. They suspected the people; and after the Parisians had taken Louis to Paris, to suspect the people was to be themselves suspect. For it was difficult for them not to convey the impression that their main end was to arrest the progress of the Revolution. They sought a body of reforms which could only have been achieved if all parties were prepared to co-operate in their promotion. No such opportunity ever came their way.

They had no mass support. But also, at least from the publication of Burke's *Reflections*, the sense became widespread in France that the English Constitution,



so far from being a means to liberty, was in fact an enemy to it. That was revealed, in part by the enthusiasm which Burke evoked at once among the propertied classes in England and the reactionaries in France. It was revealed also by the revelation that Burke did not speak for a united England. Frenchmen learned this, not only from the replies to Burke, above all that of Paine; they learned it also from the close connexions between the revolutionary clubs in England and France, in personal meeting and in correspondence. Thereby they became informed that the much-vaunted English Constitution was compatible with inhibitions upon freedom which already seemed evil survivals to Frenchmen; and they learned of growing persecution in England of those who sympathized with France. Rapidly, therefore, these awoke in the predominant public opinion of France the sense that so far from it being necessary to imitate, it would be easy to overpass, the limits of English freedom. They then felt themselves called to a task of creative innovation before which the English model seemed already an obsolete antique.

War came rapidly; and it had the inevitable effect of turning the earlier doubts into later hate. Once it had been declared, to recommend English institutions was like recommending Pitt who was their product and their embodiment. But Pitt was the enemy of the Revolution. He was in league with the King; he was the friend of the émigrés; his gold supplied the sinews of war to the Grand Coalition. Pitt, and therefore the British Constitution, sought to overthrow French freedom. Those, consequently, who saw in that Con-



stitution a façade behind which the enemies of freedom could conceal themselves were justified. And, after the execution of Louis, when it became apparent that the advocates of the English model were at worst monarchists, at best Girondins, in any case the enemies of the Republic one and indivisible, the annihilation of an Anglophil group was unavoidable. A Revolutionary government engaged in international war cannot build its institutional framework upon the tolerant habits of a debating society.

There is one other answer to which reference must be made. The French Revolution, it is important to note, was in the full sense a social revolution; in changing the class-structure of French society, it changed also the nature of the French State. It did so by a union of the middle and working classes against the economic privileges implied in a feudal system. To effect this end it had, necessarily, to break the machinery of the former State which was incompatible with its purposes. To break that machinery it had no alternative but to use violence. The possessing class having refused reform, a surgical operation was the only method available. But those who compel such operations in society unleash forces which make the victory of reason in the short run an impossible adventure. The French Revolution could no more have avoided dictatorship in its day than the Russian Revolution in our own. The men who pleaded for English ideas in 1789 were pleading for evolutionary change in a revolutionary situation. They were dealing, both on their Right and on their Left, with rivals who would have died—did, indeed, die—for their

faiths rather than compromise. The Anglophils did not understand two vital things. They failed to realize that their system destroyed all that the extreme aristocrats held dear; and it rendered equally impossible all for which the extreme democrats were fighting. In a considerable degree, no doubt, it is true that the forms for which they contended influenced, in large outline, those adopted in 1815. Their triumph, if postponed, was considerable. But it required twenty-five years of war to make men see that their scheme did in fact fit the emphasis of the new society brought to birth in those momentous years; they framed the institutional system its new purposes required. In large outline, once more, they framed the ideology of the next epoch of French history. They provided the basis for the liberalism of the nineteenth century. Their tragedy was that the men they sought to serve were blind to the wisdom invoked for their benefit.

## *The Committee System in English Local Government*<sup>1</sup>

### I

EVER since the Municipal Corporation Acts of 1835, the committee has been the pivot of the system of local government. Upon its adequacy depends the whole quality of local administration. For in every authority of any considerable size, it is no longer possible for the Council to concern itself with more than the general outlines of policy. It has become, through the increase in the scope and intensity of public business, essentially a report-receiving body which, like Parliament in relation to the Cabinet, may criticize, protest, or encourage, but cannot hope to control the details of the policy pursued. It is in the committees of a Council that policy is really made; it is in the committees, also, that the supervision of its execution is really effected. The evolution of a hundred years has transformed local councils into little more than organs of registration for their committees, in which, no doubt, policy may be disputed but in which, also, direct and continuous initiative is rarely to be sought. The main function of a Council to-day is to inform the interested ratepayer of the issues in dispute. As a true organ of government it has largely ceased to function;

<sup>1</sup> From *A Century of Municipal Progress*, edited by H. J. Laski, W. I. Jennings and W. A. Robson (London: George Allen and Unwin).

it has devolved effective power on to the committee to which it has given birth.

Committees of Council are of two kinds—statutory and optional. Under various Acts there are certain committees which a local authority must bring into being; under various Acts, also, it has the power to appoint committees, composed either wholly or in part of members of the Council, to exercise any powers which, in its judgement, may be suitably exercised by a committee. Such committees, when appointed, hold office until the next annual meeting of the Council, and all their acts must be submitted to it for approval. The range of power of such committees is limited in a twofold way. On the one hand, their authority is limited by the terms of their creation; on the other hand, they cannot, independently of the Council, either make a rate or raise a loan. It is also a general rule in all Councils that contracts entered into by a committee beyond a specified sum must be approved by the Council or its Finance Committee.

The creation of committees dates from the obligation, laid upon the boroughs by the Act of 1835, to set up a special body known as the Watch Committee, to deal with questions of police. Since that time education, the care of mental defectives, maternity and child welfare, and public assistance are all examples of subjects which require by statute the creation of a Council Committee. In certain cases, indeed, the Council as a whole cannot act in this field except after the receipt of a report from the appropriate committee. In others, the dealing with maternity and child welfare, for example, the Council can appoint only a

majority of the committee, the remainder being selected, at the Council's option, from persons specially qualified by training or experience in matters relating to health or maternity.

The creation of non-statutory committees lies wholly at the option of the Council. But it has been found essential for the delegation of power to take place on an increasing scale. Finance, establishment, housing, parks, public health, electricity supply, tramways, highways and public works, libraries, baths, are only, once more, examples of the subject-matter devolved upon committees. The number of committees in any Council varies, of course, with the size and importance of its work. The average London borough has twelve committees, and it is usual for each member of a Council to sit upon three of them. Normally each committee will meet at least once monthly, and there will, in addition, be the duties arising from the creation of special sub-committees and the emergence of urgent business. A member of a large Council may normally assume that his work will occupy some four days each month; but in the case of a special authority, like London, or of the chairman of a vital committee like that of finance, it may generally be estimated that business arises which requires almost daily attention. The burden of committee work to-day, in any local authority of considerable size, has become at least as great as that of a member of the House of Commons.

For the committee is not merely engaged in the discussion of general principles. The essence of its work is the oversight of the officials, the initiation of policy, the decision upon the details of its administration. A



Library Committee, for example, must not only choose the books which appear on the shelves. It is responsible for equipment and decoration. It must arrange a proper relationship between its service and the schools. It must provide lectures (for which it cannot pay) and exhibitions. It has to think out ways and means of helping, if it think fit, the development of adult education within its area. It has to cater for a population which varies from the casual news-reader, through the shopgirl who reads fiction as a relief from her daily work, to the serious student who may be using the resources of the public library to enable him to pass a university examination. A Maternity and Child Welfare Committee may have to decide questions which range from the desirability of a new maternity home (upon the plans of which it will have to decide) to the choice between fresh and dried milk for mothers to whom this service is extended. The committee, in fact, occupies, broadly, the position in relation to its subject-matter that a minister does in relation to his department. It is not merely a legislative body; in a sense that may be of vital importance to the quality of its work, it is an administrative body also.

Every Council varies from every other in the habits of its committee system. In some it is usual for the chairman to continue in office year after year; in others a rotation of office is usual. In some the Finance Committee is composed of chairmen of the other committees of Council; in others its membership is entirely unrelated to the composition of other committees. In some, again, the character of committee work is largely governed by the intensity of party

organization on the Council; in others, most notably in the counties, party organization has, so far, had relatively little influence on committee work. Some committees use their power of co-option to associate with themselves persons of proved experience in their subject; others regard their power to co-opt as a way of rewarding members of their party for their services to it. In some Councils, finally, the membership of committees is governed by the proportionate party strength on the Council; on others this principle is neglected, and a minority party, like the defeated party in the American Congress, may find itself debarred from effective representation upon committees of vital importance.

Amid variation so wide it is not easy to report with any precision the general burden of experience. It is probably safe to say that, save where a chairman is a man of quite exceptional distinction, the rotation of that office is desirable at intervals of some three years. A man who exceeds that period tends to think of the committee as his own. He develops his own way about its functions. He is not easily accessible to ideas which do not originate with himself. He tends to take criticism badly. A chairman of dominating temper, moreover, who has held office for a long time, easily becomes impatient of initiative in his officials, and he inhibits thereby their power to contribute the burden of their *expertise* to the committee's task.

Finance is, of course, of the essence of a Council's life; and it may be urged with some confidence that the best way to build up an adequate Finance Committee is to compose it of members who are not

already chairmen of other committees. For this prevents log-rolling in the committee itself. It makes possible and effective minority representation in finance. It secures a genuinely independent view of the Council's finances as a whole. It leaves the financial officers of the Council free from the special pressure to which they may easily become subject when chairmen of committees have, as members of it, special and direct access to them. It makes for a more critical and objective attitude to estimates when no member of the committee has a direct interest in the result of their scrutiny.

Few questions are so intricate in character as the relation of party to committee work in local government. Broadly, it may be said that once we entered upon the epoch of the positive State it was impossible to avoid the entrance of party upon the scene. Most of the large general questions which have to be solved raise issues which have a party connotation. Municipal trading, direct labour, the quality and character of schools, the range of public health services, the attitude to slum clearance and housing, are all, nowadays, so integrally related to the policies which the national parties adopt, their success or failure is so closely connected with control by those parties of the local councils, that it is reasonable nowadays to urge that, in matters of general principle, a party atmosphere is the rule rather than the exception. No doubt this is less true of rural than of urban local government; but the reason for this is probably the comparative failure of parties of the Left to make a serious impression, outside the mining areas, upon rural England. Where,

as in Durham, the Labour Party has captured a majority upon a County Council, government in terms of strict party principle becomes an immediate characteristic of the committee system.

This has meant, especially in the years since the War, an immense development of an informal committee system behind the legal structure. It is now pretty general for all party groups on any given committee to have a meeting of their own before the formal committee meeting. They go through the agenda with the chairman if they are in a majority, and decide upon the attitude they will take to the various items; or, if they are in a minority, upon the questions they will ask and the votes they will challenge. The result is undoubtedly to abbreviate committee proceedings. Its tendency is to make them less a pooling of minds, especially where the issues involved are matters of large principle, and much more a question of party opinion or strength. Where, in this atmosphere, feeling runs high because difference is acute, the tendency is naturally to transfer effective debate back again from the committee room to the council chamber. For there publicity for opinion may be counted upon, and the debate tends to assume that more formal character which arouses the interest of outside opinion.

The value of party organization in the committees has been twofold. On the one hand the rivalry of parties has made much clearer than in the past the principles of administration in local government. Policy to-day is far more coherent than it was a generation ago; there is much less neglect of particular areas of function because the committee charged with it happened to



have a chairman disinclined to be energetic about its cultivation. It is clearer and more coherent, also, because the committee groups, in the general party meeting, tend to cross-fertilize each other in an admirable way. The inter-relationships of committees, housing and public health, libraries and education, emerge irresistibly. And, on the other hand, party organization tends to speed up achievement by the Council. The election becomes a test of the record the majority has been able to make; there is something to be measured by the attitude public opinion will take. Just as a local council all of whose members are of one political complexion tends to lose driving power from the absence of opposition, so one in which party allegiance is strong tends not only to discover concrete objectives, but also to relate those objectives to a general orientation of outlook which gives meaning and vitality to the Council's work.

There is, no doubt, a certain loss involved in this development. It means the disappearance of the independent member of goodwill who has, in the past, contributed considerably to the development of local government out of a sheer sense of public duty. There is a danger also that what are in fact essentially technical questions should be transformed into party issues in the hope that party capital may be made out of them. There is even a danger that the officials may find it less easy than in the past to maintain an attitude of neutrality when the issues dividing the Council become matters of strong party feeling. There is no safeguard against these difficulties save the restraint of common sense. It is inevitable that the changes of



political complexion in the national life should reflect themselves in local affairs also. If there has been a loss of the independent member, there has been a real gain in the addition of a new and important social experience in the work of the committees. If there is a tendency to over-emphasize the political motive where it is, in fact, out of place, the gain in clarity of objective probably more than compensates for its coming. If there is a threat to the neutrality of officials, its result will, on national experience, only be a strengthening among them of that professional *esprit de corps* which has contributed most of its best traditions to British administration.

It is not improbable that the worst failure in the committee system has been its use of the power to co-opt conferred upon it. There are, no doubt, authorities—London, for example—in which the power has been admirably used. In general, however, this can hardly be said to be the case. In any strongly organized authority, nominations tend to proceed on fairly strict party lines; even in a committee like that on maternity and child welfare, where the statute demands “training or experience,” it cannot be generally said that the spirit of the power is at all fully observed. The retired school teacher who is working for a political party in his old age is a frequent appointee to the Education Committee; the wife of a councillor who likes charitable works tends to secure nomination to the Maternity Committee. It is, indeed, a pity that there is no national return indicating in some detail the use made of the power to co-opt; a Council which, having the choice between an eminent sociologist and the local butcher

for co-option to the Library Committee, chose the latter because he had been defeated at the last Council elections, would be less apt to do so if there was a greater chance that its use of its powers could be effectively criticized. There is, moreover, the further difficulty that if the co-opted member is not connected with a party group he tends to have less influence than his special experience, if he possesses it, would warrant. Nor must we omit the criticism of the principle of co-option made by the Associations of Local Authorities that it is undesirable to give power to persons who have no financial responsibility to the electorate. On the whole, despite distinguished exceptions, it may be doubted whether co-option has realized the purpose its inventors had in view.

The composition of committees is, once more, a matter of wide variation. It is, theoretically, absolutely in the hands of the Council; and where this has a strong party complexion the decision is fraught with serious consequences. Few committees work well in which there is not a healthy division of opinion; few committees, either, work well in which the minority rests continually under a sense of grievance. Looking back particularly on post-war experience, it would probably have been wise to have made it a statutory obligation for all Councils to appoint committees in terms proportionate to party strength upon the Council. Anomalies like those which too frequently occur under the present system have the wholly undesirable effect of persuading the minority to avenge unfair treatment when it becomes a majority. The result of this is not merely ill feeling; it not seldom deprives committees

of members whose knowledge and experience they can ill afford to lose.

## II

It is in the committees that policy is decided, and a large part of the effectiveness of a committee is a function of its chairman's personality. Normally, like a Cabinet minister in a department, he is an amateur in charge of technicians, though there have been not infrequent instances where the chairman of the Education Committee has been a retired teacher, or the chairman of the Public Health Committee a doctor. It is perhaps worth noting that the expert as chairman is rarely a success. His possession of special knowledge tends to over-interference with official functions and over-emphasis upon detail. He usually also has some special thesis of his own to exploit to which he gives excessive attention. Just as the greatest Secretaries of War have been laymen like Cardwell or Haldane, so the best chairmen of committees have been men of imagination and common sense who have been able to give drive and perspective to the official outlook.

The chairman's work is comparable with, though different from, that of a minister in his department. He has to think out, with the officials, the general contours of policy. He has to guide the general lines of finance. He has to encourage the officials while, at the same time, he prevents them from falling into routinism, on the one hand, or excessive activity on the other. He has to frame his committee's agenda in conjunction

with the officials, to guide it through the committee, and to defend it, if it is attacked, before the Council as a whole. He must have a general awareness of all that his department is doing. He should possess at least a working knowledge of what is being done elsewhere. He must be ready, from time to time, to state the case for some departmental innovation effectively to the Central Government. While as chairman he has a quasi-ministerial function in his committee, he has to remember also that no small part of his task is to protect the rights of the minority who serve with him and elicit from opposition members, if he can, all that it is in their power to contribute.

It is by no means an easy position. To be to some extent the master of men who are inevitably his superiors in technical knowledge; to learn to co-operate with others who will seek to profit by any mistakes he may make; to learn enough of his department to see its possibilities and yet not so much as to lose his sense of perspective; all this is to say that the ideal chairman, like the ideal minister, is a rare enough being. He is subject to two great temptations. The first is to be overborne by the zealous official whose policy he adopts in default of a policy of his own. The other is to conceive his own policy, and to push it through regardless of official scepticism. A lesser temptation, but an important one, is to allow himself to be run by his committee instead of being demonstrably its leader. Since he is only *primus inter pares* upon it, the weak chairman is easily persuaded to let the committee take things into its own hands. It is a grave error; for it either means an absence of coherency in the planning



of work, or else the triumph of mere routine in the failure to have a continuous and deliberate objective.

The classic example, of course, of the chairman at his best is that of Mr. Joseph Chamberlain in the years when he was leader of the Birmingham City Council. His success, on the evidence, was due to certain clear perceptions from which he never swerved. Experience of Birmingham life taught him certain definite objects of policy he wished to attain; to them he devoted all his immense energy and ability. He saw also that the technical preparation for his ends was a matter for his officials, and not for him; he left, therefore, the work of detail to them. But he secured their eager co-operation from the outset by the zeal he brought to the understanding of the official point of view, the emphasis with which he protected them against attack, the encouragement he gave them for good work done. Hardly less important were the time and energy he spent in educating his own colleagues to a sense of the significance of what he was doing. They were well spent; for the result was to surround himself in the Council with a body of informed colleagues only less enthusiastic than he was himself about the need to bring his great plans to a successful conclusion.

It is difficult, indeed, to exaggerate the good, or the harm, a chairman may do in any prolonged period of office. In the first place, he builds a tradition, and this may well influence the habits of his department long after he has ceased to preside over its destinies. In the second place, he will profoundly affect the work of his officials. A chairman with a big plan, a chairman who knows how to encourage men to give of their



best, a chairman who refuses to allow the official to be snubbed or unfairly attacked, will add enormously to the efficiency of his staff. And, conversely, the chairman who is himself interested only in the routine he has inherited, who is aloof, or weak, or discouraging, will rapidly affect the quality of service he can command. He has got to learn the qualities of his staff, their ideas and hopes and fears, exactly as he might learn those of a body of men in his own employ. He must be on the look out for the capacity which deserves promotion. He must be prepared to hear and investigate grievance. He must be a careful student not merely of staff conditions in his own authority, but also elsewhere. He must learn to realize that the ability to build up a contented and efficient staff is half the art of local administration.

Not less important are his relations with his colleagues on his committee. He has not merely to carry them with him, so far as he can. He has got to create the sense, among his opponents not less than among his friends, that a large part of the work of local government springs from the pooling of minds rather than from the antagonism of minds. Men may differ upon large questions of principle who, nevertheless, when decisions of principle have been taken, can co-operate upon the details of its application. No small part of the difference between good committee work and bad in local government depends upon appreciation of this fact. For no one who has had experience of its functioning will deny that, all political difference apart, there is a large area of what may be called common agreement in which all members of a committee can be persuaded

to give of their best. A committee, to take an obvious example, may not agree upon the principle that it is desirable to pull down Waterloo Bridge; but good chairmanship can still secure, after the decision to pull it down has been taken, intellectual co-operation of the kind that will ensure that the best possible bridge takes its place. Good chairmanship, that is to say, has an opportunity in committee work, that it rarely possesses in the full Council, of deliberately narrowing the area of political antagonism so that the functioning of a committee may become a genuinely corporate adventure.

No small part of this ability lies in the chairman's capacity for communicating a real sense of responsibility for his committee to the other members of it. He has the task, which is a complex one, of at once maintaining his own leadership and, at the same time, evoking responsible initiative from his own colleagues. Few changes are so real in any committee as that which follows after a merely routine responsibility in its membership. Its sources are manifold. It may be an over-autocratic chairman. It may be a refusal to consider some project of a private member sympathetically. It may come from a discouragement of officials, a tendency to seek for economies indifferently to the weighing of their results. Unless a chairman can transform a committee into enthusiasts for the development of the service with which he is charged, he has failed in his task.

For it is one of the outstanding characteristics of local government in the last century that, indifferently to political opinion, its subject-matter has been able to

evoke enthusiasm from all who have been concerned with its administration. The stout Tory councillor to whom nationalization of the mines is anathema will, as a member of a local Electricity Committee, show a zeal for its development which should satisfy the most ardent exponent of socialism. The main educational development of a large northern local authority has been largely due to a Liberal councillor who must be one of the few remaining Englishmen with a full faith in *laissez-faire*. It is an administrative truth of the first importance that men who get their hands on a big governmental machine become concerned to exploit its full potentialities merely by learning what they are. Just as no small part of English social progress in the nineteenth century was due to the reports of doctors, sanitary engineers, and educationists who, indifferently to their political views, worked out the technical implications of the material they were charged to investigate, so also no small part of its progress in local government has been due to the disinterested zeal of councillors who have been concerned to push forward the schemes of some committee in whose work they had become interested. No small part of the difference between a good chairman and a bad one has depended upon his ability to realize the significance of this truth.

One other aspect of the chairman's work deserves a word. In any committee which is built upon party lines, a good deal of his efficiency depends upon his power to make his party group play as an effective team. If his committee is small, and it is unnecessary from the area of its functions to subdivide it into other committees, this is not a very difficult task. But in a

large authority, like London, for example, many of the committees must be divided if they are to do their work efficiently. There are, for instance, five sub-committees of the Education Committee in London; and the number of sub-committees dealing with hospitals is wellnigh legion. Where subdivision is necessary from the mere range of duties, the chairman must, as in London, delegate his powers to colleagues; and not the least part of his task is so using these as to make his own line of action implicit in the policy they follow. He has to confer upon them at once the sense that they are associated in an adventure in which he is the leader and that, within the sphere of their sub-committee, they must bring to their work an independent drive and initiative of their own. Any one who knew the late Sir John Gilbert's work in London will recognize that this was an art that he possessed in a peculiarly eminent degree. The educational policy of London under his chairmanship not only moved, but moved in a unified way. His colleagues on the sub-committees of the larger body were essentially like members of a Cabinet who, while they are left large freedom in their departments, always feel the co-ordinating hand of the Prime Minister outside. That power to integrate is of the essence of the administrator's art; and without it no chairman can feel secure in the driving of his team.

### III

Committee work in local government differs from that in the national sphere in that its outstanding quality



is a function of direct contact between members and the officials of Council. While the contact between a member of the House of Commons and those civil servants who so largely influence policy is at best interstitial, in a committee of a local authority the elected councillor and the chief officials have a direct and continuous relation. Indeed, it may fairly be said that the more close the co-operation between them, the more effectively is its work performed. A committee relies upon its officials not only for expert information and advice, but for the shaping of plans, the guidance of policy, that discreet and tactful criticism of either excessive inertia or over-bold experiment which has been so largely responsible for orderly progress in English local government during the last century.

Formally, of course, the members of the committee are its masters; and the officials are there merely for the purpose of advice. But no really able official remains an adviser only. Broadly, it may be said that the less technical the subject-matter of the committee, the more influential the advice of the committee is likely to be; and in the technical field an official who has judgement and tact in the handling of men will know but little limitation to the influence he can exercise. His task, indeed, is a delicate one. He has to win the reality of power without seeming to secure it. He has to arrive at some *modus vivendi* not only with his chairman, to whom the exercise of personal power may be a precious experience, but of members who enjoy "teaching the officials their proper place." He cannot dominate them, since he thereby merely invites attack. He cannot intervene in debate with the hot,



pungent argument which is often decisive in discussion. He has to hint, to persuade, to learn by trial and error the delicate art of letting facts speak for themselves. He has to learn to press advice without arousing antagonism and to invent policy without seeming to be its author. He has to steer his way through men often enough separated by personal and political differences which may easily combine to defeat his views of what his committee ought to do. He has to discover the point at which the outcome of technique is transformed into political principle, and to withdraw into effective silence at its boundary. He must learn how to handle kindly the crude prejudices with which he is so constantly confronted, and at the same time to discover that amongst them there is often an invaluable idea which his technical knowledge may shape to useful purpose.

It has been said of the great public servants of the Crown that they are the men who have exchanged dignity for power. In their sphere something of the same quality may be attributed to the local officials in this context. At their best, with men, for instance, like Sir Thomas Johnston or Sir Robert Blair, they reach a level of statesmanship for which no praise could be too high. They are, in fact, the responsible authors of creative policy which they pursue for long years with success, not only persuading Council after Council, but even Parliament itself, to realize the significance of their views. An effective official builds a tradition for his committee which may well transcend altogether its political complexion. He must be able to persuade without appearing to dominate. He must not

only know when to give way; not less important he must know how to return to his ideas in such a way as to prevent them from seeming to be his personal idiosyncrasies. He must learn the difficult art of making committee meetings a training-ground for its members not only in the task of leadership, but also in the realization that his subject-matter is important. For he has to remember that everything he conceives to be desirable is always governed, in the long run, by the overwhelming consideration of finance. An eager Director of Education, an enthusiastic Chief Librarian, an energetic Borough Surveyor will not have their way unless they can persuade their respective committees that it is urgent for them to have their way; and the best method of convincing them of this urgency lies in the art of successful persuasion.

At its best, accordingly, the relation between the committee and the official is positive, and not negative, in character. The preparation of agenda, reports, statistics, for a committee is, inevitably, the preparation of policy for its members. There results from this a number of inferences which it is perhaps worth while to draw. (i) In general, the relation is at its best when the experience of the official has not been limited to service with a single authority. Where the official has not had to consider, through variety of experience, the foundation of his routine, he will tend, after a surprisingly brief time, to take the principles of his administration for granted, and he comes, thereby, to lack that power of adaptation to new conditions and ideas which is fundamental to his creativeness. (ii) In general, also, long continuance in office of the same

chairman is bad for the committee. Unless he is an extraordinary man, he tends to adopt both a policy and a procedure which he is not anxious to change. Official habits and expectations become adapted to his habits and expectations. The things he dislikes, the specialisms he pursues, tend to become recognized as principles in the department. Where the chairman of long tenure is a powerful personality, the whole initiative of the committee then too easily becomes concentrated in his hands. His policy becomes not an ideal to be criticized, but a command to be imposed. Sooner or later this means rebellion in the committee as new members arrive for whom the tradition is not sacrosanct; and when rebellion comes, the danger that the officials will be regarded as wedded to the older view is a formidable one. Especially where a local authority is sharply divided on party lines, it is difficult to preserve the faith in the neutrality of the officials, in circumstances such as these, which is of the essence of successful administration.

The relation is positive in another way. Every committee naturally looks to its officials for guidance. Its members know, in a vague and general way, what they want to do; but they inevitably rely upon the officials to translate their broad conceptions into concrete administrative reality. No one who has watched a committee at work can doubt the immense influence the official yields in effecting this translation. The estimates of cost; the critical evaluation of the scheme itself; the making of relevant comparison with other experience; all these provide him with opportunities for shaping policy which may well be decisive

of its fate. One is tempted, indeed, to the generalization that the quality of a committee is almost a function of the energetic criticism of its chief officials.

But, so stated, the generalization is too wide. For there is an interaction between the official and the members of his committee which may well make all the difference to his effectiveness. Few officials will be really successful without the encouragement of their elected superiors. They have to possess the mysterious sense that something big is afoot. They have to realize not only that they are encouraged to plan, but also that there is certain to be energy and drive behind their plans when they are made. There are instances and to spare in the history of English local government of a poor official in one authority becoming an admirable official in another simply in terms of the interest and effort put by his committee into its work. This is the outcome of that alchemy of personality for which no standing orders or committee practice can provide. It is a function of character and temperament which prospers or fails as officials and councillors manage to learn the art of working together.

One supreme merit, at least, the relation has. It has kept the English system of local government astonishingly free from the insidious vice of bureaucracy. Any one who compares it with that of Germany or of France can have no doubts upon this head. The German system may be more efficient and, especially in the towns, more experimental in outlook; but it is far more government from without, far less capable of developing the sense of local initiative and responsibility, than is the English system. A distinguished German official is



much more the master of his town than his English counterpart; he is also much more visibly a member of a caste or order to whom public opinion matters much less than it does in this country. The French official has neither this importance nor this self-esteem. But the French relationship, despite achievements like that of M. Herriot at Lyons, has little that compares with the English model. The French principle of deconcentration leaves far less elbow-room to a local council to find its own corporate spirit and in a big city the essential feature of the career alike of official and elected person looks to the national government for its final expression rather than to the fulfilment of local opportunity. Nor is any comparison possible with American experience. For the American councillor or mayor is essentially a professional politician using his local position as a stepping-stone in the consolidation of a national career. He is usually engaged in local politics as a man is engaged in this country in business or one of the professions. The ideal of part-time and unpaid service is hardly known save as a temporary cure for the evils of that widespread corruption which historic circumstances have made almost endemic in the American system. The relation accordingly of the elected person to the officials bears little resemblance to the habits we know in England. Either it is that of superior and inferior, in which the technique of the official is too profoundly sacrificed to the end of the party or the persons in power; or, as often with the best officials, it is a relation of parallelism in which technique and formal authority struggle with one another for the support of a public opinion whose



## THE COMMITTEE SYSTEM IN LOCAL GOVERNMENT

active interest can rarely be elicited except at moments of great tension in a crisis of special import.

At its best, the virtue of the English method is the same as that which distinguishes the relations between minister and civil servant in a department of the central government. It is built upon a mutual appreciation of the contribution each can make, rather than upon any formal rules. Theoretically, the elected committee of amateurs is the master of the field. Actually there is no definable limit to the influence the expert official can wield, granted only that he has the two qualities of disinterestedness and personality. The elected committee contributes common sense, an experience of the results of what the service involves, a body of general principles which set the perspective of the administrator's technique. They will rarely know the detailed import of the vast technical material upon the general bearing of which they are called upon to decide. But a good committee will learn fairly rapidly to appreciate its drift. They will develop with astonishing quickness that same capacity which is outstanding in the House of Commons—that power to judge men which makes character, not less than ability, a passport to confidence. No doubt the growth of functions has made it more difficult in recent years for the amateur to follow the processes of the expert with anything like the easy assurance of a century ago. The official inevitably has a larger place than was then the case for the simple reason that the lines of policy follow more naturally from the discoveries of his technique than was then even imaginable. But it is still true of local government that the largest objects of public policy are a

matter in which the amateur's conception of what constitutes the well-being of the community remains supreme. So long as the English people is determined to preserve this conception—in itself the heart of self-government—no increase in the complexity of local government problems and no extension of the area of its functions will admit the disease of bureaucracy within the system.

For there is no evidence to suggest that the officials have sought an undue magnification of their power. On the contrary, everything goes to show their realization that the elected committee is an admirable instrument for breaking a policy, as Sir Arthur Salter has put it, on to the back of the public. There has grown up, in local politics as in national, a doctrine of elected responsibility which happily divides power from influence without the need to erect defined boundaries between them. The occasions are rare in the working of the committee system when it becomes necessary to teach the official that he is the servant, and not the master, of his committee. The occasions are rarer still when their relations reach that point of strain where fruitful co-operation no longer becomes possible. Committees, no doubt, are known in which the members resent any overt display of official initiative; and one sometimes finds the official, particularly of long-standing and settled routine, who resents innovation in ways to which he has become accustomed. Yet, on the whole, any one who compares the quality of local government to-day with what it was one hundred years ago, cannot avoid the conclusion that, on this head at least, the committee system

has proved itself. It stands, with the Cabinet and the modern Civil Service, as one of the fundamental English contributions to the difficult art of self-government. Its achievements become the more remarkable the more closely they are scrutinized.

IV

Every committee, as a normal rule, must report its proceedings to the Council for approval; and, in theory at least, the Council invariably remains the formal organ for the registration of decisions. For a number of reasons, however, it is the committees, and not the Council, which remain the effective centre of decisions. Since the Council is composed almost wholly of men who must earn their living, its members, as a whole, lack the time necessary to examine the whole range of committee work. In any large authority, moreover, the Council is too big for effective scrutiny of detail to be undertaken at its meetings. It is not an exaggerated estimate to say that in an average Council some 90 per cent of the resolutions passed in committee will go through the Council without challenge. As a general rule, the details they contain are no more susceptible of general debate than the substance of the several thousand rules and regulations made annually by the departments of the central government under statutory powers delegated to them by Parliament.

On analysis, therefore, the function of the Council in relation to its committees becomes threefold in nature. It is the proper place for general debate on principles. It is the proper place, also, for criticism

of any committee action which raises matters either of large substance or of wide financial import. It is the proper place, finally, in which to survey the general plans of the committees for each year of office as revealed in their proposed annual estimates. Broadly speaking, a Council that does these things efficiently is able to exercise a sufficient control over its committees when the fact is borne in mind that it has power over the general ambit of their authority by the terms of reference from which they take their origin.

For in this way the Council assures to itself the necessary critical examination of any point that may be open to question. A committee works with the knowledge that any of its decisions is open to challenge. It cannot be secretive about its proceedings, partly by reason of the fact that the presence of the minority there is a vital factor in making public the motivation of its acts, and partly because, in the last resort, it is never the master of its actions until the Council has finally spoken. It is not, perhaps, as true to say of the Council as it is to say of the House of Commons that in any matter of wide general import, the public has an assurance that all that needs to be said on all sides will be said; there are probably few Councils outside the largest in which the level of general debate is as high as this would imply. But it is true to say that few decisions of real moment, especially if they have any serious financial consequences, will pass unnoticed. And this, it may be added, has become more true in recent years as Councils have tended to become increasingly invaded by the national parties. This has made local policy much more an expression of national



principle than it was, for example, in the Victorian age. In matters like housing, education, public assistance, municipal trading, the use of direct labour, the attitude of a Council is much more likely than in the past to be determined by general political considerations which make debate more useful by elevating the discussion from analysis of detail to scrutiny of principle. In a sense, no doubt, this tends, in its turn, to make the work of the Councils of a more uniform pattern than in the past; there is a certain loss of local distinctiveness. But it makes also for a far greater clarity in objective than was the case formerly by making the differences in party complexion in a Council much more a clash of philosophies. This, in its turn, makes the work of the committees far more significant, especially in the urban areas where party organization is stronger than it probably has been at any previous time.

The question has been raised as to whether the control of a Council over its committees is nowadays close enough to secure the requisite co-ordination. The average Council meets monthly for some eleven months in the year; it sits perhaps for two or three hours; can it, in so brief a period, scrutinize with any thoroughness the work of committees which take thousands of decisions annually? For, it is pointed out, few of the committees have any close relation to one another; each, indeed, is to some extent jealous of its own independence. And the officials of the Council tend to a similar independence also. There is little continuity of contact for the shaping of co-ordinated policy between the Director of Education and the Chief Librarian, between the Chief Medical Officer



and the County Surveyor. We may find that the policy pursued by an Education Committee is progressive while that of a Library Committee is inert or even reactionary. While an able Town or County Clerk may be able to effect a high degree of administrative co-ordination, no one would expect him to be responsible for co-ordination in planning over a field so wide as the activities of his Council. And since the latter never really initiates policy, correlated movement in the policy of a Council is something for which the present system, it is held, makes inadequate provision. There may even be clashes in policy of a kind stigmatized as "ludicrous" in matters so important as housing or the acquisition of land.<sup>1</sup>

There is no doubt some truth in the criticism, though it may easily be pressed too far. For, after all, the same Cabinet may be notable for wide divergencies of outlook in relation to co-ordinated problems. An active Foreign Secretary may be flanked by an inert President of the Board of Trade; an enterprising Minister of Transport may have as his colleague a Postmaster-General whose only ambition is to let sleeping dogs lie. No system of government yet devised has been able so to organize its activities as to proceed in parallel formation upon a single front. Variations in personality, the exigencies of time and finance, the principle of prior urgency, all militate against this possibility.

And any well-organized Council is related to agencies

<sup>1</sup> H. Finer, *English Local Government* (1933), p. 225. Cf. Simon, *A City Council from Within* (1926), which appears to form the basis of Dr. Finer's criticism.

of integration which are at least as notable as the centrifugal tendency. In subject after subject the central government is at hand to define a minimum standard of performance and indirectly to encourage the achievement of something beyond this level. Some co-ordination, further, is achieved by the Finance Committee; a good deal can be done by the General Purposes Committee; more still by the fact that most members of the Council are members of several committees, and inevitably utilize the experience and purposes of one to stimulate the experience and purposes of the others.

But more important than any of these is the integration contributed, in any well-organized Council, by the party group and its meetings. As a rule this has two aspects. On the one hand it is an executive of the party chairmen of committees. They meet together fortnightly, or more often, discuss their difficulties, and plan their course of direction. More policy is born in small and private meetings of this kind than in any other organ of local government. It is free, it is intimate, it is composed of members upon whom the main responsibility rests. Beyond it is the group meeting of the party as a whole. To it the executive of party chairmen presents its report on policy. It will go through the party agenda. Questions will be asked, grievances freely ventilated, information be given. It is not infrequent for such a meeting to set up special sub-committees to consider what line of action shall be taken on some problem of particular significance. Then the problem goes back to the group to emerge therefrom into the committees of Council for more

public discussion. Here, above all, the centre of effective co-ordination is to be found.

It is complained, further, that the system lacks any critical examination of finance such as is performed for national expenditure by the Treasury; that the Finance Committee does not seriously go into the estimates in a Treasury spirit.<sup>1</sup> But, in fact, in any Council where the finance officer is really efficient, the technique is not a very different one. No committee can overspend without the sanction of the Finance Committee. Each item of its estimates will be canvassed by the Finance Department, and comparison with previous years will be carefully drawn. A chairman of a committee who, on grounds of general policy rather than exceptional urgency, desires a supplementary estimate will find himself the object of a criticism not less rigorous than that which the average Department meets from the Treasury. It is, no doubt, true that a Finance Committee does not co-ordinate policy further than to estimate their financial consequences. It may protest against the commitments to a new housing scheme; but if the party majority is determined upon it, and the necessary confirmation is forthcoming from the Ministry of Health, the Finance Committee is unlikely to have its way. But, after all, if a First Lord of the Admiralty has persuaded his Cabinet colleagues of the need to build more ships, the Treasury will have to accept increased naval estimates. The chairman of a

<sup>1</sup> Cf. Mr. Arthur Collins, *Finance Departments in Administrative Control of Public Administration*. October 1927; and the evidence of Sir Ryland Adkins to the Royal Commission on Local Government 1925, Vol. I, QQ. 1954 f.

Council Finance Committee is in much the same position as an average Chancellor of the Exchequer. He will have his way to the extent that he can persuade his colleagues that proposed expenditures are unwise. His weapon is an analogous one—the impact of expenditure upon the ratepayer, as the Chancellor points out its impact upon the taxpayer. It is true that a Finance Committee composed of chairmen of spending departments is not the most efficiently devised watchdog for this end. But where it is composed of ordinary members of the Council this does not apply; and, if policy is to proceed upon any scale, it would be impracticable to give it a control over finance if by that control is meant a veto over proposals in the interest of an integration that must be rightly effected elsewhere. It may even be said that Treasury control in the sphere of national government is of very doubtful advantage from the angle of putting a big policy into operation. It must, after all, follow Cabinet policy critically at the best; it is not its business to dominate the Cabinet. And the argument that the Chancellor of the Exchequer is “by tradition” the second man in the Cabinet is a fallacious one. No one questions his importance; but the weight he will carry on any particular question depends upon the policy he is urging. Chancellors of the Exchequer, like chairmen of Finance Committees, win and lose in terms of their ability to convince their colleagues. We may have dominating Chancellors like Mr. Gladstone; but the history of Lord Randolph Churchill makes it plain that even an urgent Chancellor is not always triumphant.

In any case, co-ordination through financial control is a wholly mistaken principle unless the view be taken that there is a definable upper limit of desirable expenditure. But as long as the proceeds of a rate are so various and the needs of local authorities so different it is impossible to discover such a limit with any precision. Co-ordination, in these terms, is bound to be on the one hand a function of party organization in the Council, on the other a function of the qualities of its members. If a particular committee has a poor chairman, or inefficient officers, even obvious need for development will not produce the same result as where the reverse is the case. We are in a realm here where institutional mechanisms reach but a little way. The problems which co-ordination raises are problems of values on the one hand and of men on the other. These cannot be resolved by giving additional powers to one committee, or creating a new one, or by revising the Standing Orders. They are met by electing to a Council men of vision and insight who know how to find and to use competent officers. On the whole, looking back on the last century, it cannot be said that English local government has ill succeeded in this task.

v

There is, however, one aspect of Council work in its relation to the committee system in which real defects are apparent: in the system of appointing, training, and promoting officials. If one thing is apparent from experience, it is the need for uniformity and centralized principle in this matter. Every local authority needs a



single Establishment Committee charged with the function of regulating this field. So far as possible, it needs also to relate its practices to those of other Councils, not least in regard to superannuation, in order to promote the maximum movement from one authority to another, especially in the lower grades of the service. It requires to insist upon the possession, or acquisition, of standard qualifications for appointments, it should discourage patronage, and the simple, but undesirable, practice of mistaking seniority for merit where promotion is in question; it ought to make provision for encouraging the junior members of its staff to get further training after they have entered its service; and it ought to insist, in all non-technical appointments, upon entrance by competitive examination wherever possible. On the analogy, further, of the national Civil Service, the larger local authorities ought to encourage the entrance of university graduates into the service, and to discourage the retention of the wholly evil system of part-time appointments.

It cannot be said that local authorities have met the problems raised by the immense developments in their staff in any adequately imaginative way. Many Councils have no Establishment Committee at all, but leave the employment of staff, and all the related issues, to each committee individually. Recruitment outside the larger authorities is still haphazard and fortuitous. A good deal of discreet patronage, sometimes something more evil still, persists over wide areas. The number of Councils with proper schemes of grading, promotion, and education of staff is still quite inadequate; and superannuation is still a far from universal rule.

It should be added, further, that the development of Whitleyism, based upon a proper recognition of trade unionism in the local service, is still in its infancy. In the realm of staff problems more has been done by the different associations of local officers to secure proper standards in their respective spheres than has so far been done by the Councils themselves.

The reason for this failure lies, on the whole, in two directions. Partly it is due to the immense increase in local government functions in so short a space of time. As always, English government, proceeding rather by improvisation than by principle, finds itself in the middle of a problem with a sense of surprise at its existence. Partly, also, it is undoubtedly due to the jealousy of each local authority for its own independence. To adopt a uniform principle of management in this field seems to many of them like a criticism of their past methods and traditions. Yet it may be said with confidence that all the reasons which led, first to the appointment of the Northcote-Trevelyan Commission of 1853, and then to Mr. Gladstone's Order in Council of 1870, in the national Civil Service, now require a similar reorganization of technique in the local government service.

On experience there appear to be required the universal acceptance of seven principles. (i) It should be a statutory requirement for all Councils to set up an Establishment Committee with the power, subject to the overriding authority of the Council itself, to decide all staff questions. (ii) If possible by agreement through the Associations of Local Government Authorities, but otherwise by statute after an appointed date,

national recruitment to the local service, so far as the general principles of admission are concerned, should be enforced; and Establishment Committees should be compelled to act within the framework of these principles. (iii) Superannuation schemes should be universal, obligatory, and compulsory. (iv) Subject to existing interests, part-time posts and the system of premium-pupils (which leads indirectly to patronage) should be abolished. (v) In all authorities employing more than thirty officials, the Whitley principle should be accepted as the basis upon which to deal with staff problems. (vi) Every committee of Council which applies to the Establishment Committee for additional staff should accompany its proposed appointment with observations thereon from the Finance Committee of the Council. (vii) All Establishment Committees should devise schemes of educational training for officers not already in possession of appropriate qualifications for their posts, and the possession of these should be made a condition precedent to promotion above a certain salary point in the grade concerned.<sup>1</sup>

Upon some such basis as this the relation between Council and committees on the one side, and committees and their officials on the other, is likely to be far more satisfactory than in the past. The problem has now reached proportions when it is impossible any longer to be satisfied with the *ad hoc* and individual solutions with which we have been so far content. Not less truly than Whitehall, the local government service

<sup>1</sup> On the whole problem of the local civil service see the Report of the Departmental Committee on the Recruitment, Training, and Promotion of Local Government Officers (1933).

has become nationally important. We have admitted this, in a sense, by making certain technical appointments, the Medical Officer of Health and the Chief Constable, for example, subject to central confirmation. We now need to go farther, and secure uniform and minimum conditions within the service, even granted the range of difference that exists between the local authorities. The way to that vital end lies through the full acceptance of the Establishment Committee and all that it implies.

## VI

A special word should perhaps be said upon the anomalous position of the Watch Committee in relation to the local Council. Though, under statute, it is appointed by the Council (though in the counties the power of appointment is shared with the Justices of the Peace) its proceedings, on the police side, are not subject to review by the Council, and even its finances come imperfectly under Council control. The purpose of the arrangement has been to keep all police problems, especially those connected with the function of prosecution, free from the danger of personal or political influence.

The problems to which police administration gives rise in any community are, of course, manifold and complex. In the light of the inquiries of recent years, it cannot be said that the solution we have adopted is a really satisfactory one.<sup>1</sup> Training and recruitment

<sup>1</sup> Report of the Committee on the Police Service, 1919; Report of the Committee on the Amalgamation of the Police Forces, 1932.



raise issues which would better be solved by a definitely national force; there is little reason, either, to doubt that this would make the detection of offenders easier in difficult cases; and it would admit of considerable economies in such matters as the training and housing of constabulary. But more important are the facts that a national police force would remove two difficulties which remain real and profound a generation after Redlich commented upon them in his classic treatise. It would remove local pressure upon prosecutions for petty offences in relation to the liquor traffic, the abatement of the smoke nuisance and motor offences; this, only too often, is still pervasive, especially in the smaller police areas. It would also make much more effective than is now the case the direct location of responsibility for police activity.

At present the situation puts the Council in an impossible position. It appoints a committee whose decisions it cannot discuss, much less control. Outside the Metropolitan area the Home Secretary has no responsibility. London apart, therefore (for the Home Secretary, as the famous Savidge case made manifest, must answer fully in the House of Commons), the principles of police administration are in the hands of men who need give no account of their trust. If a police Peterloo were unfortunately to recur, the only effective control a local Council could exercise would be to change the composition of its Watch Committee at the end of its year of office; in the counties, it would not even be in that position of indirect authority. It is clearly undesirable that this position should continue. Responsibility for administration ought to involve



censure for maladministration; and a dissatisfied Council ought to have the power to make such change in control as it thinks desirable. As it is, under the present régime, responsibility rests in a twilight world from which its consequences never clearly emerge into the light of day. We may grant that the record is happily free from major scandals; but the basis of the system remains administratively unsound.

## VII

An analyst of the functioning of local government in England is tempted to build his categories on a theory of the separation of powers, and to argue that while the function of the Council may be equated with legislation, the committees find their appropriate sphere in the task of administration. In actual fact, no such convenient simplicity is applicable. The success of the system has been built, not upon the separation of powers, but upon a confusion of them, half deliberate, half unconscious. Every committee at some stage of its work is legislating not less than administering; and there is a wide range of functions imposed upon them in which it is difficult not to describe their tasks as at least quasi-judicial in nature. If a good Council can stimulate its committees to creativeness, it is not less true that good committees make for an effective Council. It may, indeed, almost be said that where there is one really good committee on a Council, its purposive energy will stimulate others, and thereby the Council itself, into creativeness.

The success of the system has undoubtedly been due

to that curious combination of amateur and expert which is characteristic of English self-government. By its influence innumerable small shopkeepers, local estate agents, semi-feudal landowners, coal miners, retired professional men, have been transformed into public-spirited servants interested in a complicated technique for its own sake, and eager to speed on a development which has largely transformed the national life. The system, like most things English, depends for its successful working on the ability to compromise at pivotal points. It may be doubted whether it would have worked so well if central control in important spheres had not come to stimulate the repair of local deficiencies. It owes more than it is usual to acknowledge to the development of standards of competence in the self-governing professions. It owes hardly less to the fact that the extension of the franchise has raised rapidly to a much higher level the standard of public satisfaction demanded for the amenities a local authority must provide. It owes a good deal to the development of public taste and public self-respect through the development of national education; and one of the vital products of this development has been to bring into membership of the local Councils a *nouvelle couche sociale* whose wants and experience have been sufficiently different from those traditional a generation ago as to widen creatively the horizon of the Councils.

It has had its failures. In general it has been curiously unsuccessful in arousing widespread public interest in its work. The time it requires, in the counties the amount of travelling it involves, has seriously diminished

the range of capacity upon which it ought to be able to draw; and the fact that it is unpaid service has meant a regrettable handicap, again mostly in the counties, upon its ability to attract working men and women into its ranks. Not unconnected with its failure to arouse public interest is the fact also that its work generally is too technical in character or too detailed in extent to be attractive to the press; it too often needs to attack some powerful vested interest to become "news" in the accepted sense of the word. Something, too, must be attributed to the character of the statutes upon which its powers rest; the fact that any deliberate innovation in authority will probably require an Act of Parliament has no doubt operated as a technique of pre-natal control for much local initiative; there must be few Public Library Committees which have not considered embarking upon a system of lectures only to find that to obtain powers to pay the lecturers would run them into Parliamentary expenses they cannot afford. They have suffered also from that limitation upon the sources of their service which has made them too often compelled to regard the angry eye of the ratepayer first, and the quality of the amenity they offer afterwards only. They have been affected, finally, by the absence, in our scheme of things, of bringing before the Councils and their officials any really adequate view of comparative experience, whether domestic or foreign. There is always a point in the history of administration when it needs to be regarded from an eminence.

But, all things considered, the committee system has proved itself amply in the working. It has not only

## THE COMMITTEE SYSTEM IN LOCAL GOVERNMENT

been a nursery of local statesmanship, some of it of remarkable quality; it has served also as a means of fertilizing Westminster with the results of local experience. Its success has been a safeguard against that easy tendency to centralization which is the paralysis of effective self-government. There is no reason to suppose that its flexibility will not prove adequate to the conference even of more responsible tasks in the future. No doubt areas will have to be revised and powers reorganized; but when this is at long last accomplished, the technique of the committee will certainly be found to be the pivot which makes possible the democratic operation of local government.

*Nationalism and the Future of Civilization*

## I

NO Englishman who cares for freedom has ever been able to watch without emotion the struggle of an oppressed people for self-expression. The famous phrase of John Stuart Mill that "it is in general a necessary condition of free institutions that the boundaries of governments should coincide in the main with those of nationalities" is only a sober way of stating that which Byron and Swinburne, Meredith and Browning, hymned in passionate song. As a people, we have rarely failed to sympathize with the effort of any nation to secure in terms of statehood the principle which Mill laid down. Greece, Italy, the republics of South America, all owe not a little to English pilgrims of the spirit to whom a failure in this realm would have meant unendurable bitterness. Your Chairman to-day<sup>1</sup> is not the last of those to whom the call of national freedom was the kind of sacred appeal which could not go unheard.

I do not deny the strength of the national claim; the evidence is too fiercely strong on every side of us. I admit, gladly and willingly, that a people charged with the care of its own destiny achieves thereby a spaciousness not otherwise capable of being attained. Self-respect, exhilaration, creativeness—all these seem

<sup>1</sup> Mr. H. N. Brailsford.



to be the definite outcome of self-government. The suppression of the yearning to be free always poisons the well-springs of the body politic. Austro-Hungary, Ireland, the old Turkish empire, India, stand as irrefutable evidence of that truth. In so far as we can give to each nation the power to express itself as a state it seems to me clear that we liberate a spiritual energy which, beyond discussion, adds to the happiness of mankind.

But it is one thing to admit the title of statehood to a nation; it is another thing, and a very different thing, to admit that statehood can safely imply all that it has been taken to mean in the course of the last hundred years. It is easy to see that, whatever the loss in administrative efficiency, a nation that is deprived of the right to determine its own way of life suffers an abridgment of personality which, sooner or later, issues in violence. We should gain nothing—and we should lose much—by the forcible suppression of the Welsh language in schools. We should gain nothing, and again we should lose much, by denying to Soviet Russia the right to conduct her own vast experiment on lines far different from the historic experience of Western Europe. To the degree that we refuse to India what is essential in statehood for her national freedom we impoverish the spiritual well-being of the world.

It is, however, idle to deny that there is an egoism in the national State which bodes ill for mankind. A wide cultural freedom, local self-government, geographical unity—these are all intelligible, even admissible claims. But the demands that we encounter do

not end there. The nation-state, having come to be, yearns to be strong. It adopts policies the impact of which upon other nation-states must cause any observer misgivings of which I cannot exaggerate the gravity. It seeks security from attack; and there comes the problem of armaments and strategic frontiers. It seeks an outlet for its surplus population; and there are restless experiments in colonization. Its merchants reveal anxiety about their markets; and we are plunged into imperialist and mercantilist adventures about which the spirit of nationality throws a dangerous glamour. Immigration, religious unity, the attitude to colour, are merely illustrations of the way in which the exclusiveness which is of the essence of nationality gives rise to issues which do not admit of any simple solution. National minorities within an alien state—in Poland, for example—create problems which menace the peace of the world. Seventy years ago Mazzini's lyric enthusiasm for the nation-state seemed to almost every generous mind in Europe—Lord Acton is the only notable exception I know—a gesture of emancipation. I doubt whether any body of generous-minded men would display that certitude now.

What has happened? The science of the nineteenth century industrialized civilization; it annihilated the distances of the world. Continents ceased to be separated from one another; Buenos Aires became neighbour to London. Economic exploitation proceeded upon a scale which required whole continents for its satisfaction. The new industrialism demanded ever more raw materials, and then ever more markets in which to dispose of the finished product. Civilization

came to depend upon mechanisms so delicate and so inter-related that a boom on the Stock Exchange of New York might alter the habits of life of a Balkan peasant. The power in the hands of the industrialist and the financier shaped the remotest places of the earth to his pleasure. China could no longer sleep beneath her mighty wall; the African jungle gave place to the road and the railway. And behind the men who planned these immense conquests, these dramatic, if only half-visible, crusades, was the newest power of all—the organized authority of national States. It is their entrance upon the scene of action which has given to the claims of nationality a perspective so different from what we could have even dreamed fifty or sixty years ago.

For what has happened is the harnessing of the national spirit to this vast search for economic power. It may have its imperial phase: Mannesman in Morocco, Rhodes in Africa, an oil company in Mexico bring to their aid all the passionate intensity of faith that it embodies. It may be of a local character: the manufacturer of Australia or Czechoslovakia seeks to protect his market from the invasion of a foreign rival. We get the spectacle of nations armed to the teeth and using their weapons to compel the acquisition of wealth. Sometimes, as in Persia, they agree to divide the spoils. Sometimes, again, as in Northern Africa, their inability to agree brings them into the circle of contingent conflict. The zest for expansion is so great that human ingenuity is exhausted in its service. Its contempt for alternative ways of life is so profound that not the least of its results is the way in

which the Ancient East has been quickened into challenge of Western Europe. It is Asia to-day which resents our dominance. Will it be Africa to-morrow?

A world of competing nation-states, each of which is a law unto itself, produces a civilization incapable of survival. For the law between those states is the law of the jungle. It is instinct, at every point, with hate and fear and insecurity. To the measure of its power, each nation-state seeks to realize its destiny without regard to the effect upon its rivals. You can see that in the relations between France and Germany, or between Japan and China. But the temper is not confined to the great nation-states alone. Poland and Lithuania, Hungary and Rumania, are suffused with a similar spirit. Because each is the sovereign master of its own will, its power alone is the measure of its possible achievement. And, thinking in terms of power, it must equip itself with the instruments by which power realizes its ends. It becomes the victim of that meanest of all illusions in which bigness is mistaken for grandeur. It becomes deaf to the voices of Reason or Pity or Love. It is so anxious at all costs to affirm its own essence that it is careless of the price the world may pay for its affirmation.

The question into which I wish to inquire is the compatibility of this nationalism with civilization. Admitting as I have admitted, the right of each nation to live under the government of its choice, I want to discuss the extent of the powers that government should possess if nationhood is not to destroy the tradition of a civilized existence. I shall argue that the principle of self-determination is one to which



distinct limits have to be set. I shall try to show that the inescapable interdependence of nations makes it impossible for any one nation-state finally to decide any question in which other nation-states have a serious concern. I shall urge upon you that the facts drive us to the envisagement of the nation-state not as a sovereign community, but as a mere province in the *civitas maxima* of mankind. Just as we spent the nineteenth century in thinking nationally, and in completing the pattern of the institutions of national self-government, so, I shall seek to show, we must spend the twentieth in learning to think in international terms, in building, as best we may, the organs of that international community every year of delay in whose coming brings us so much the nearer to disaster.

## II

The nation-state is a sovereign state; it therefore knows no will higher than its own. It is the final judge of its own purposes; within the realm of law, it is answerable to no one for its acts. The tragic consequences of that power we saw in the War of 1914; we are seeing it again in the Sino-Japanese dispute. But war is the only final term in a series which poisons the atmosphere of peace. Armaments, strategic frontiers, tariffs, embargoes, limitations upon the transit of persons and of goods, all these are part, though only a part, of the technique by which the modern state seeks to accrete power unto itself. There is no limit to the things it can do save its own power to accomplish them. And behind that will are ranged the profound



and irrational impulses of nationalism which supply it with an emotional force largely blind to ideals of right and wrong.

We had some measure of what that force implied in the late war. Each of the belligerent nation-states was completely convinced of its own purity, and just as completely convinced that its opponents had deliberately willed the war. Each stigmatized doubt or hesitation as unpatriotic. Each had no difficulty in enlisting on its side the influence of the different Churches, which, for the period of the War, reduced their deities to tribal emblems to be placated by special incantations. In the anxiety for victory there was no cruelty too horrible to perpetrate, no sacrifice too great to demand. Most of us, I suppose, now realize how shameful was the cruelty, how vain the sacrifice. But all the elements which were present in 1914 to occasion the outbreak are present among us in undiminished vigour. There is no one unaware that a recurrence of 1914 must mean the end of civilization. There is no one, therefore, but must admit that the power to will war cannot be left to the unfettered discretion of any nation-state. But there are few prepared to make the inferences necessary to the translation of that admission into fact.

Yet I suggest to you that the inferences are, in sober truth, clear enough. They are simply the international aspect of our constitutional maxim that what touches all must be decided by all. Exactly as in the national-state majority-rule has proved itself by its obvious conveniences, so in the international community the will of the single national-state must

give way before the larger claim it encounters. It cannot fix its own armaments, because, in the great society, that is a claim to fix the armaments of all other nation-states. It cannot define its own frontiers, because that is a claim to fix the frontiers of other states. It cannot claim extra-territoriality for its legislation in other communities, because that is the demand for the power to control the habits and customs of other communities. Once, in a word, the action of one nation-state at all seriously affects the life of another, we have an obvious subject of cosmopolitan law-making. For that subject, the present discretion of a single nation-state must be replaced by the law of an international community organized for this purpose.

I see no escape from this conclusion; and I think it frankly means the end of the sovereignty of the state in international affairs. It compels us to think of the *civitas maxima* first, and of the nation-state as a mere province in that wider community. I do not desire to minimize the consequences of this conception. Frankly, it ends a tradition which has behind it the experience of four hundred years. It means difficult experiment with novelties neither the implications of which, nor the institutions for which, we yet fully know. It will alter the perspective of our thinking as profoundly as any change in human history. It will, not least, put our loyalty upon a plane different from any to which modern times have been accustomed. Yet the only alternative to its acceptance is disaster.

For think of the area international government must cover if it is to offer us the security we need.

Currency, tariffs, armaments, treaties, frontiers, statistics as the necessary basis of all international legislation, the power to decide all disputes between existing nation-states, and to bind them to the acceptance of the decision, the control of the movements of peoples, the care and protection of the backward races—these, I think, are indispensable minima of international control. So long as any one of them is left to discretion instead of law, there is the danger of conflict; so long as there is the danger of conflict, there exists a menace to the continuance of civilization. We cannot avoid the consequences of the environment we have created. Modern science means a world-market; a world-market means world-interdependence; world-interdependence means world-government. To act upon the consequences of that tremendous syllogism is the only pathway to our security. If we leave to the nation-state now the sovereignty it has enjoyed in the past, we leave it to exploit the rest of the world without regard to the latter's well-being. We harness to that exploitation all the impulses and emotions nationhood engenders. We put reason on one side for the sake of a power unallied to justice.

The transformation of the nation into the sovereign-state is, in a word, what Professor Gilbert Murray has aptly termed the flaw in the nineteenth-century system. Sovereignty in the international field was intelligible enough when difficulties of communication made the kind of interdependence we know almost unthinkable. The influence of science and mass-production was then wholly sporadic in character; Detroit and Nanking were as distant as two planets.

All that has passed. Is it not, then, essential that we should effect an institutional recognition of its passing? Can a system of government which developed to fit the needs of a civilization hardly touched by scientific discovery really suffice for one which lives in and by its acceptance of what science achieves? Can a London which the aeroplane now makes a day's journey from New York afford to think on a scale inadequate enough, in all conscience, when New York was six weeks' voyage if the winds were favourable? Can an England which could not survive unless its food-supplies were brought almost hourly from the ends of the earth afford to think in terms suitable to its simple self-sufficiency of the seventeenth or eighteenth century? Can we look at wars which bring whole populations within the direct ambit of their ghastly outcome as though they were still matters which affected no more than a comparative handful of professional soldiery, or a score of men-of-war at sea?

We must learn to think internationally or we perish—that, I suggest, is the clear alternative before us. You cannot think of a decision made by a nation-state within the realm of those functions I described a moment ago which does not have far-reaching consequences upon the rest of the world. When we went off the gold-standard in September 1911, we altered in its essence the economic position of Scandinavia. The American tariff has had decisive ramifications upon the social history of Western Europe. A reckless credit policy by a small Austrian bank alters not only our power to maintain the standards of unemployment insurance, but the whole incidence, at least for a period,



of the distribution of English political power. Where the dogma of national sovereignty implies results so momentous, is it not likely to lead to that helpless anarchy which is always the precursor of chaos?

We have become so accustomed to the dogma that we are, almost unconsciously, the prisoners of the emotions to which it gives rise. Great Britain as a sovereign-state means, we say, Great Britain as the mistress of her own destiny. Are we to surrender to foreigners, who neither understand our ways nor care as we care for our interests, the control of that destiny? Can we conceive ourselves as accepting decisions vital to our own way of life which go against us? Would America, for example, accept an order from a world authority to admit Japanese immigrants in unlimited numbers to the Pacific States? Should we refer a quarrel between ourselves and the Irish Free State to a tribunal we could not control? Should we alter our tariff at the behest of a world-authority if we knew that the steel manufacturers of France and Germany could then drive those of Great Britain from their own home-market? Do not the grim and inescapable psychological facts make the idea of world-government an empty, some would even add an ignoble, dream?

There is no habit more dangerous to our well-being than to confound the institutions we have inherited with the necessary institutions of society. Let us look, for a moment, at the internal functions of government. A century ago few save the most daring thinkers would have admitted that housing, health, and scientific research were, to take random illustrations only, a definite matter of governmental concern. Town-



planning and the control of transport are becoming as naturally an accepted part of consciousness as the rule of the road. Just as the internal sphere of government moves to fit the pressure of our needs, so, I suggest the external sphere of its authority will move to fit it also.

More slowly, no doubt, and more unwillingly, because the emotional acceptance of the results is more difficult. National feeling is a sentiment tough and obstinate in the way that the religious sentiment is tough and obstinate. It will yield to no magic formula of diminution; only long experience will soften its intensity. But few people who are not professional students of the subject realize how wide is the already existing area of international organization, or how profound is the allegiance it is able to evoke. The very fact that the Council of the League was unable to avert the outbreak of hostilities at Shanghai was felt by literally millions of men and women to be a major disaster for the world. With all its imperfections, no observer aware of the facts can doubt that there has come into being a League consciousness of which even the most national-minded statesmen have to take account. And any one, again, who studies what the League has accomplished in little more than a decade—who also compares its fortunes with the effort of the Holy Alliance a hundred years ago—cannot help concluding that it has become a pivotal part of our institutional life.

I do not, of course, minimize its defects. It is unlikely to succeed so long as it remains a League of sovereign-states; and it is bound to move too slowly for the facts

so long as it depends upon the rule of unanimity. There have been grave failures—the Silesian plebiscite, the weakness before the problem of minorities, the painfully slow progress towards effective disarmament. The successes, alongside the problems, are definitely on a minor scale. The gaps in the Covenant are serious. The absence of Russia and America from membership does the most serious damage to its possible utility.<sup>1</sup> But state the case against the League at its very worst, it would yet be true, like the God of Voltaire, that if it did not exist we should have to invent it. To make it function in a full and continuous way is necessary to our survival as a civilization.

I recognize fully that it does not so function, and it is important to know the cause of that inadequacy. The critics who insist that it is because it cannot exorcize the demon of nationalism—that it is, so to say, in its very conception against human nature—seem to me to miss the point. For to urge that is to argue that nationalism is incapable of satisfaction except in terms of the full adventure of sovereignty. Such a view I hold to be a mistaken one. That full adventure does not, except in form, belong to Switzerland or to the Scandinavian countries; yet on its plane the nationalism of each is full and rich and contented. Effectively, it does not, either, belong to the British Dominions; I see no reason to suppose that their nationalism is stunted as a consequence. Nationalism, I believe, can be fully satisfied without flowing into the channels of sovereignty. What it seeks is freedom

<sup>1</sup> The reader will remember that this was written in 1932. League history since that date has had a grimmer content.

from an alien control like that of Austria over Italy, of Turkey over Bulgaria, of Russia over Poland. The sources of the search for sovereign powers must, on the evidence, be sought in different directions.

Here, perhaps, I may interpolate the remark that the attempt to make sovereignty in international law the full-blooded monster revealed, for instance, in Hegel and some of his disciples is a totally unnecessary effort. It arises from a series of historical causes I cannot now stay to examine, on one side, and, on the other, it is the sacrifice of life to logical formalism. For in the actual facts of international life sovereignty and statehood are not convertible terms. Few lawyers now take Austin's rigorous view that international law is not law at all; its inescapably binding character, the responsibility of the state for its infraction, are becoming more and more widely recognized. There has grown up a veritable system of state servitudes—financial, judicial, administrative—which are not now regarded as derogatory to statehood. Whatever may be the demands of logic, in practice, the sovereignty of states must now be understood invariably in a relative and restrictive sense. Any other view introduces impossible difficulties and dubious fictions into the problem of explaining the facts which confront us.

In other words, non-sovereign statehood is a conception to-day which does no violence to reality. Why, then, do states insist that derogation from the majesty of sovereign power is an adventure upon which they are not prepared to embark? Why do we say, for instance, that there are some international disputes we are not prepared to submit to arbitration? Why do

we sign the Kellogg Pact with the reservation that there is a region in the Middle East in which our interest is emphatic and special? What underlies the continual American insistence that membership of the League would destroy its sovereignty? Is the search for sovereignty by the nation an adventure from which there is really no prospect of escape?

I agree that, if escape is impossible, the conception of a *civitas maxima* is an idle and an empty dream. If we cannot get a widespread and profound acceptance of the League spirit, and that in all its implications, the pursuit of perpetual peace is certainly a hopeless adventure. But is such pessimism justified by the facts? Are not the main causes of war rooted in facts with which we can deal, if we want to deal with them? Can it ever be said of whole peoples that there are ends they deem so precious that, whatever the cost, they are prepared to fight for those ends? Here, I think, we have to distinguish carefully. I can conceive without difficulty causes for which men will willingly die. A nation fighting for its freedom has, I make no doubt, a full sense that it is engaged in a holy adventure. But we are compelled to inquire whether most modern wars are in fact of this type. We are compelled, further, to decide whether nationalist sentiment is enlisted behind them until the actual moment of conflict comes. We are entitled to know, in a word, whether men lose hold of reason until its opportunity to decide disagreement has already been abandoned by the leaders of a nation-state. My own view is that, for the most part, the common people have no interest in, or passion for, the making of war until its coming is so



inescapable that the instinct of pugnacity triumphs over common sense. Then reason becomes the slave of passion, and its power to bind men to its service is nullified until weariness or defeat decides the issue once again.

Take any of the great disputes which have led to or threatened war in these last generations. The conflict over Morocco, the scramble for Africa, the fight for the spoils of Manchuria, oil in Mexico and the Middle East, iron in Lorraine, Egypt as the gateway to the East—as we survey the issues, is it not vital that each one of them involves a search for economic power? It is never, be it remembered, a search by the nation-state. The policy is that of a group of *conquistadores*—now Rhodes, now the Mannesmann brothers, the *Comité des Forges*, Standard Oil. They see the opportunity for exceptional profit. They secure, by means into which it is rarely politic to inquire, concessions of economic value in some alien territory. They expend large sums in the development of those concessions. Then difficulties supervene. They are challenged by foreign competition. They lack security for their labours. The foreign state or native chief does not live up to his bargain. For some such cause as this, the adventurers come to their Foreign Office to demand the use of force for the protection of their investment. Is not that the history of African settlement, of the adventures of the United States in South America, of the occupation of Egypt, of Japan in Manchuria?

And when the adventurers go to their Foreign Offices and obtain their support is not the result the alliance between the search for profit and the sentiment



of nationalism? We want our group to win rather than some group of foreign capitalists. The arts of propaganda are exhausted in the effort to persuade us that some particular search for profit is in fact a holy war. Are Englishmen, we are asked, to die unprotected in a foreign land? Are we to do nothing to protect the initiative, the enterprise, the capital, of men who have taken our flag to the uttermost ends of the earth? We can look back on the War of Jenkins's Ear and know it for the sordid commercial struggle that it was. But, in grim fact, are not most modern conflicts at bottom similarly commercial and sordid? Do we not wrap them up in the same fine cloak of idealism, and discover reasons to justify that which, in naked fact, reason would be unable to justify? We did that in the South African War. We surrounded a mean search for gold with every sort of noble motive—progress, the rights of British subjects, and the rest. We made the man in the street so bewildered by propaganda that he believed himself to be battling for a veritable army of the Lord by the time the first guns had been fired. Yet he was, in fact, simply lending the urgency of national sentiment to a struggle between a dubious group of financial adventurers and the farmers of the veldt for the right to dominate the economic future of South Africa.

I have used a British illustration; but the picture would be just as true if I spoke of French or German, American or Japanese, history. In every case nationalism becomes the servant of economic imperialism; it gives the latter its driving force, and the intensity of the adventures provoke war. For, as a general rule,

the end of the adventurer in this realm is simply profit. Even where, as in India, he embarks on great constructive work, his economic penetration and his political control are alike meant to serve that end. He does what is demanded by the need of maximum security for his profit—but he does no more. In the subject-populations he breeds only dislike; in his rivals he breeds only covetousness and envy. And the protective armament in which he clothes himself is the power to appeal in his defence to nationalist sentiment. He counts upon his ability to fashion it to his purposes. So far, of course, he has been right in the assumption that he will succeed.

For study the public opinion of any nation, and one becomes terrified by the ease with which it is capable of perversion. France the historic enemy becomes the natural friend overnight. We discover the soul of Russia in 1914 and insist upon her natural barbarity in 1918 after the Bolsheviki had seized power. We are lyrical about the United States until the Armistice; we picture her as Shylock demanding her pound of flesh when, in our troubled circumstances, she demands the payment of the debt we have incurred. Nothing seems more simple than to invent a criminal nation for the crowd. Nothing is more easy than to make our ally the incarnation of all the virtues. There was even a time, during the Crimean War, when the Sultan of Turkey could be represented to the British people as a kind of reincarnation of Alfred the Great.

The flag follows trade, and it gives to trade an emotional penumbra from which the trader derives enormous advantage. The rivalry of financiers to

obtain concessions in mines and railways in the Middle and Far East during the nineteenth century is an illuminating commentary on the habits of imperialism. It could, I think, be said with truth that the partition of China among the European powers between 1850 and 1900 was prevented only by the inability of the protagonists to agree about the division of the spoils. And when you examine the results of the relation it is always an effort to protect the commercial and investing classes of the states involved. They are the nation for the purpose served by the state. The working classes share in the result only in a way so indirect that it is doubtful if they can truly be said to have benefited by its operations.

Upon all this I desire to make two observations. The first is that the nationalism which issues in imperialist conflict has been possible only through the ignorance of the common people. That ignorance, moreover, is the outcome of the class structure of our society. So long, as Lord Acton wrote, as a single class retained in its hands "the making of the laws, the management of the conditions, the keeping of the peace, the administration of justice, the distribution of taxes, the control of expenditure," it was inevitable that the masses should be the servant of its purposes. It wanted profit; it regarded the use of force simply as a means to making its profit secure. And since in each nation-state this class had a similar outlook the end was inevitably conflict. The only way out was an educational system which gave the masses a full light upon the relationships in which it was involved, the ends for which its crude patriotism was exploited. But you

could not get such an educational system so long as economic power was in the hands of the commercial and investing classes. It was not to their interest, since it would have revealed the character of their exploitation. That, put brutally, is why we have to spend more on armaments than we do on education. That, also, is why every state-system of education bends its energies to the intensification of nationalism. You can see that intensification in the history books we use. All the energy and enthusiasm are lavished on the men who gave the nation-state its present form and power. Our children learn amply of Nelson and Wellington, of Clive and Rhodes. Is there an equal effort to make plain to them the greatness of Jeremy Bentham, the noble protest of Bright against the Crimean War, the effort of Charles Bradlaugh to achieve genuine religious freedom? We do not have education for peace, simply because, under our system, that would destroy the foundation upon which the imperialist uses national sentiment for his purposes. We shall not get education for peace until we have ended a social system in which, as in our own, inequality makes the many the servants of the few.

My second point is, perhaps, of more immediate practical import. The nationalism of Western Europe sought to organize all Asia for its economic profit; and the result has been a widespread and conscious revolt of Asia against European domination. You can see that in the revival of Turkey and of Persia. You see it, again, in the nationalist intensity of India and China; you see it, in all its formidable strength, in the typically Western imperialism of Japan. Even Afghanistan



sought, under Amanullah, such a reorganization as would enable it to resist encroachment from Western Europe. I do not myself see how the effort of Asia to win its independence can easily be attained without at least the prospect of grave disaster to the world. We have largely destroyed its historic character for our own selfish purposes; and we find that the standards we have imposed in its place carry with them an ideology which threatens our private interests there. You can see in Asia a conflict between civilizations which has bred chaos. That chaos involves our intervention to protect our commercial interests; and intervention, as it meets the nascent nationalism of the East, clearly means large-scale conflict. We cannot, I myself believe, keep India or China in perpetuity in semi-subjection. Yet how precisely we are to assist them to win their independence and integration when the latter spell the ending of imperialism is not, I think, clear. Once Asia is fully self-conscious and fully organized, it will end Western control. But if the road to that ending lies through the kind of vehement economic nationalism we ourselves know to-day in Western Europe, it is difficult not to feel that the outcome is dark indeed.

I have, of course, no magic formula to propose; you cannot heal so deep-seated a disease with an incantation. I am satisfied if I have persuaded you that nationalism breeds imperialism, and that the latter at long last breeds nationalism again in the peoples whom it subjects to its control. To-day it is Asia; will it be Africa to-morrow? Have we not, if we would escape the immense conflict that such a sequence



portends, to think in different terms? Having tried the world of sovereign-states, each looking to its own interests, each unlimited in law in the will it may seek to operate, each competing with its rivals in terms of force, and force alone, as the ultimate arbiter between different wants, can we really be content with the results? Does not the mere selfishness of ensuring our own survival compel us to think in different terms?

If we do so the alternative is unmistakable. We have to think of the world-community, the *civitas maxima*, as the starting-point of the social adventure. No part of this community can have the right or the power to act as its own will deems best warranted, without regard to the will of other parts. That body of law which represents the needs of the whole must bind the will of each of its constituent members. Differences between their wills, adjustments of their relationships, cannot be a matter of the independent volition of any state. We need institutions which prevent the state from hindering the needs of the world-community from being realized. And that is to say that the world-community and the sovereign-state are incompatible terms. We must choose between the one and the other; we cannot have both. We must recognize that international law has a claim superior to municipal. We must admit that there are things a state is not entitled to will—fields of decision in which its choice is one term only in an equation of choices. Little by little there must grow in the League of Nations the authority to determine all questions, decisions upon which have more than an incidence in

a single state. Nationalism emerging into statehood results, in a word, in an egoism we have discovered to be intolerable. Either we must curb its excesses—which means the end of the sovereign-state—or they will destroy civilization.

Do not think that I imagine that this can be done in a year or even a decade. No one who realizes how painfully the nation-state was born, how important were the needs it once served, can imagine that its hold upon the allegiance of men can be radically disturbed, as it were, overnight. But there is all the difference in the world between travelling over difficult territory with a conscious knowledge of one's goal and travelling with no clear sense of direction in which we propose to move. If we approach our problems, as they arrive, with the definite intention so to solve them that the solution in each instance, even at the cost of loss to ourselves, results in gain to the idea of a world-community, we shall strengthen its hold as part of the habit of our lives. If Japan had thought in that fashion during her dispute with China, the prestige of the League would have made the conquest of the next obstacle infinitely less difficult. If we had signed the Optional Clause without reservations, our faith in the pacific settlement of international disputes would have created a deeper and wider faith in others. If we had insisted from the outset upon the proper treatment of the minorities under the Peace Treaties of 1919, the evasion of clear obligations by nations like Poland would have been far less natural than it now seems. If, in a word, we really believe in the League and all it implies, we must prove our faith by

constant service to it. And as we serve it, we shall find, or so I think, that its transformation into a genuine world-community, so far from being a challenge to our power, will, on the contrary, be its main security. For it will give us the assurance of peace; and only in peace can the virtues of a nation achieve their rightful reward.

### III

There is an internal as well as an external side to the problem of nationalism; and my plea would be fatally incomplete if I did not consider its problems. Just as there is a struggle for power between nation-states, so there is a struggle for power within them. The conflict of classes has a direct bearing upon the problem of the international community. I am even tempted to say that a nation-state will treat other nation-states as it acts towards its own citizens. Where there is repression within there will be at least the straining towards violence without; we become to others what we have been content to be to each other.

In this aspect the Labour clauses of the Treaty and the work of the International Labour Office are of extraordinary interest. They show the interdependence of the nations with a clarity perhaps more revealing than any other documents of the modern time. National competition in things like the conditions of work, the effort to underbid your neighbour by lowering the standard of wages or lengthening the working-day, produces instant reactions all over the world. Unless we can secure effective and equal social conditions

the conflict of business men for the possession of markets is bound to assume its present form; and inherent in that conflict is the dangerous economic nationalism to which I have already drawn your attention. You cannot maintain high tariff-barriers in a unified world-market; but you cannot avoid the clamour for protected markets if rivals are to undersell one another in terms of the inadequate conditions they can force upon Labour.

Nor is that all. We are members of nation-states in which, even though there sometimes be the formal aspect of democracy, its reality remains unachieved. The bias of state-action is always in favour of those who possess the levers of economic power; even where they make concessions they do so, not because they should, but because they must. And the consequence of that bias is that the will of the state means, in daily action, the will of those who possess the economic power of the community. The history of imperialism makes it clear that the Foreign Office and the Colonial Office are at their command. One ministry may resist; one statesman may denounce; in the end, all are driven to give way. I see no method of preventing the state from becoming the tool of those who invest abroad except by the international control of investment. I cannot here attempt to outline what that implies in detail.<sup>1</sup> But it would, I suggest, prevent things like the domination of the South American republics by the United States, or our own conquests of India and Africa. International control can, if we so will, be made to mean the moralization of external

<sup>1</sup> Cf. my *Grammar of Politics*, pp. 611-14.



policy. It can prevent the investor from exploiting nationalist sentiment for purposes which are too often innocent of ethical motivation.

But more than this is implied. Make the strongest case you can against democratic government, and it yet remains the only political system in which men are recognized to possess an equal claim upon the common stock of welfare. Alternative systems, however admirably they may begin, always end by protecting the interests of a few. Dictatorships become concerned for their own self-preservation; aristocracies, whether of birth or wealth or creed, sooner or later confound the public good with their private welfare. But if we choose democratic government we cannot be satisfied with its merely formal expression. However great may be the winning of political democracy, it is only a stage to the conquest of what democracy fully implies.

That full implication is, I suggest, equality in every aspect of life. Do not mistake me. I do not mean by equality identity of treatment. I recognize, and with gladness, the infinite variety of human personality; the need, accordingly, to give it the most diverse means of expression. But if you have a national society in which, like ours, men live so differently, they are bound to think differently. They have an interest in the result of the social process so different that there is no common ideology binding them together. They do not share in a common ideal; they do not strive for a common ideal. They lack that fundamental unity of purpose which gives vigour and tenacity to the national life. No society can hope to be democratic



that is divided into the two nations of rich and poor. That division, more than any other, I believe is responsible for imperialist adventure. For its true implication is to force upon the rich the choice between sacrifice and revolution. They are rarely prepared for the first; it alters too drastically their way of life. They so rarely realize the coming of the second that, almost invariably, they postpone concessions until they are too late. And to avoid the price of concession the class which possesses economic power seeks an opportunity of investment abroad, where the return to capital offers the chance of maintaining that way of life to which it is accustomed. Capitalism becomes imperialism by the very logic of its being; and the necessary outcome of imperialism is always conflict.

It is, I think, no accident that the birth of British imperialism—the end, also, of the Free Trade epoch in this country—should have coincided with the challenge of Continental nations to our industrial supremacy. Nor is it accident that the closing of the West in the United States should have led that country into her South American extravagances on the one side, and her excessive mercantilism on the other. Japan, in my judgement, begins to think in similar terms; and you can see in her effort the same fatal implications. The internal struggle for economic power always leads to imperialism as the easiest way to avoiding the duty of economic justice. At the outset the path always seems a simple one. In the end it is always a *cul-de-sac*. It does not solve the problem; it merely postpones it. In England, as an internal issue, it resulted in the eclipse of Liberalism; but it only

raised up the Socialist Party to make the struggle between rich and poor take on a more obvious and more dramatic intensity.

My own inference from this is the vital one, that economic equality is the effective condition of democratic government. On the experience of history, it is the only way known to me of preventing the conflict between rich and poor from issuing either into imperialism or into revolution; and neither of these seems to me compatible with the life of reason, since each has its being in the rule of force. In an economically equal society the incidence of the state ceases to be biased in one direction; its power can be genuinely used, as it cannot be otherwise used, for the common good in a sense that really has some meaning. In such a society, also, there is less danger than now that ignorance may be exploited by propaganda; for there is less interest in keeping the reality of education a virtual monopoly of the few. There is less chance of utilizing the power of organized religion to maintain a *status quo* the inherent injustice of which is seen as soon it is examined; and the Churches do not, as a result, maintain themselves in the degree that they are the servants of reaction. Whatever may be our doubts of Bolshevism, let us at least admit that its leaders were right when they insisted that religion has been the opium of the people.

I plead, therefore, for an economically equal society as one of the essential ways of preventing the perversion of national sentiment to the maintenance in power of a wealthy class. It may help the status of the poor, at least in a material sense, to share in the spoils of the

imperialism which is born of inequality; but the price is always paid by those who are exploited in the territory brought under imperialist control. The Mexican peon, the Chinese coolie, the Indian ryot, have been compelled to pay the price for the Anglo-American standard of living. More, I do not believe you can suppress freedom abroad without danger to its reality at home; and imperialism always means the suppression of the demand for freedom among the peoples subject to imperialist domination. It was not accidental that the Indian "nabobs" poisoned our eighteenth-century politics, that the American Revolution was followed by the grim oppression of the younger Pitt; and I cannot help seeing significance in the fact that two legal members of the Viceroy's Council in India, Sir Henry Maine and Fitzjames Stephen, were both, after their experience of autocracy abroad, the passionate critics of democracy upon their return to England.

"Choose equality and flee greed" is, as Matthew Arnold insisted, the clear lesson of historic experience. But I am not so foolish as to suppose that we destroy the dangers of nationalism merely by creating an equal society. Such a state would still need markets and raw materials; it would doubtless fight for access to them if access were denied. It is even conceivable that a genuinely democratic society might be more fiercely nationalist than under the present system. For the erosion of inequality would give to the claims of the state a title to allegiance it does not now possess. Its citizens might easily come to feel a patriotism almost religious in its intensity. There is some inter-

esting evidence that this is the case in Soviet Russia. The appeal made there by the idea of equality is obviously remarkable. And the French Revolution showed, in an important way, how the removal of deeply-felt oppression gives to the ideas which replace it a drive and an energy far greater than are possessed by those which deny to the mass of the nation their place in the sun. To safeguard the world-community from the dangers of democratic nationalism is not less important than the duty of denying to the capitalist state the power to enlist national sentiment in its service.

Again, as I think, the way out is the abrogation of national sovereignty. A world-community, properly organized, and with the right to control the activity of its constituent parts, could genuinely seek to meet the difficulties involved. I do not see that they can be met in any other way. Indeed, I should be almost tempted to argue that the abrogation of national sovereignty is the condition upon which alone peace is safe in a world of democratic states. For if economic penetration gives to such states the chance of improving upon a wide front their standard of life, the temptations to use their power for this end might well prove irresistible. I, at any rate, do not feel certain that such states would feel a special tenderness for Africans or for Asiatics, that they would not take advantage of the weakness or divisions among the less advanced peoples to exploit them for selfish purposes. Imperialism of this type might well divide the Western world into camps as fiercely hostile to each other as religious parties in the sixteenth century. It would not be easy



to set limits to the consequences of such a disaster. It would breed a temper of persecution all over the world that would make havoc of those spiritual values which, in the long run, are the really precious qualities in civilization.

There is one other aspect of the national spirit which is shown when it proclaims itself as a sovereign-state to which I want to draw your attention. To establish the state as sovereign, it seeks always what Lord Acton called the abrogation of the intermediate powers in the community. It is so fiercely absorptive in temper that it will admit the right of no body which may be conceived as even a possible challenge to its will. The republic one and indivisible lives by the erosion of all competing loyalties. The allegiance of men to the state is regarded as necessarily prior to all alternative allegiances. That title is not founded on the conduct of the state. Its law does not permit the citizen, either as an individual or in association with other individuals, to judge its policy, to allow his mind freely to protest about its activities. The state is the armed conscience of the nation, and so it proclaims itself as being; and we differ from its views at our peril. It invokes on its behalf all the mysticism which nationality secretes within itself. Acceptance, and blind acceptance, of its purposes becomes in very truth a religion. Think of the difficulty attendant upon criticism of the nation-state in time of war. Realize how hard it is to attack a government which is able to conceal its limited and partisan purposes behind the label of nationalism. The destruction of intermediate powers in Italy and Russia leaves the individual a helpless unit



before the demands of the state. His will is stricken into impotence. He can speak with safety only as he echoes or supports the policy of those who operate the engines of policy.

Once it is conceived that the claims of the state are *a priori* superior to all other claims, that they are entitled to acceptance just because they are the claims of the state, there is an end to all justice and freedom in society. No organization is entitled to our loyalty merely because it is a point, a source of reference, in a legal hierarchy; its title depends upon the ethical adequacy which pervades its exercise of its power. And of that exercise individuals must, in the last resort, be judges for the simple reason that upon any other condition they abdicate the duty of citizenship. It is not an easy task to let one's mind play freely about affairs of state. It is made infinitely harder when the state presents itself as sovereign; when, moreover, that sovereignty is suffused with all the mystic glamour which comes from its position as the political embodiment of the nation. Diversity is strangled; individual rights are sacrificed; centralization destroys that eager spirit of local and functional responsibility out of which creativeness in government is born.

The power, in short, to call the state to account is essential to freedom, and it cannot exist where the state is sovereign. That power, by dividing authority, compels restraint in its exercise. It promotes independence of mind, and it gives that independence opportunity of expression by providing it with the means of organization. In such an atmosphere problems can

be answered not merely in the context of the power possessed by the state, but in terms of the ethical adequacy of the solutions which are suggested. To differ from the state does not, then, imply an absence of patriotism; and that possibility of making such difference effective is the main safeguard we have against servility in the society which the state controls. I know, of course, that it is no longer fashionable to praise freedom and tolerance as desirable things. Yet I venture still to cherish them as the sole conditions known to me whereby Reason has a chance of victory in human affairs. The alternative is to assume that the big battalions have the right to triumph merely because they are the big battalions. That way, I suggest, lies a slavery both intellectual and moral.

I wish I had the time to exact of your patience a review of all that this attitude implies in institutional terms. I should like, above all, to show you its connexion with the newer tendencies in international law, especially its relationship to the possibility of an international penal law, the operation of which cannot but benefit, as I venture to think, the wants of us all. So long as international law derived its sanction only from the assent of sovereign states it could not have an effective penal side. It was bound to rest content with the indication of certain very limited classes of acts as reprehensible, and trust to the good faith of states to give effect to that indication. Once we begin to think in terms of the world-community, the stage is set for an ampler progress. It is not only that we are moving towards the idea of aggressive war as such as a crime against international order, and, therewith,

towards the idea that the duty of a citizen whose state embarks upon such an adventure may come to mean the imperative obligation to disobey its orders. It is not improbable that we shall come to view certain types of state-action, or the failure of state-action, as susceptible of punishment by an international court. A failure, for instance, to take proper precautions to prevent civil riots against foreigners may one day become an international delict to be tried in the Permanent Court. And I do not believe it to be unthinkable that where, as in the Sacco-Vanzetti case, the justice of the state has plainly failed, we may develop an international writ of habeas corpus to remedy the deficiencies of local error.

But this is to give a rein to the imagination I may not now indulge. It is sufficient if I can persuade you that the concept of the non-sovereign state offers possibilities of creative adventure of which it is difficult to exaggerate the importance. The need to attempt them is plain. Even if it be true that their making is fraught with danger, the answer surely is that the alternative to making them is fraught with death. Nationalism has enjoyed its midsummer of high credit in these latter years. I understand, I think, its attractions—the fascination it has exercised over men who, like Mill and Mazzini, were the indubitable servants of high ideals. I have argued that the conditions under which those ideals seemed imperative have decisively changed. As soon as nationalism invoked the sovereign state as the means for its expression it endangered the very foundations of international security. The needs to which it was a response have largely passed. The

concepts upon which it was based must give way before a new ideology more suited to the wants that we confront. We have to think of cosmopolitan law-making; it certainly cannot be made effective if the sovereignty of the state blocks the way to its construction. We need a new Grotius to outline the ground-plan of a new civilization.

IV

Two final remarks and I have done. The ideal for which I have been pleading is not a new one in history; great names stand high in the list of its advocates. We tend, I think, a little to forget how new in history is the conception of the state as freed from the shackles of law. To the eminent thinkers who founded the modern science of international law in the sixteenth century such a conception would have been unthinkable. They had, hardly less clearly than the most urgent internationalists of to-day, the dream of a world-community whose life was governed in terms of inescapable principle. You have only to read the works of men like Franciscus à Victoria, like Soto, like Grotius himself, to realize how sternly they would have repudiated the notion that the power of a nation is the measure of its rights. Signs are not wanting of a return to this attitude. It was said by Hall, a great English international lawyer whom no one would accuse of idealism, that the repudiation of international law during a period of conflict would be followed by an era in which men sought above all things the refreshment of its authority. That prophecy is rapidly



becoming true. The search, all over the world, for means whereby the power of its principles may be widened and deepened is one of the most hopeful portents of our time. I will not trouble you with names. I suggest only that the decline of the positivist school of international law, the frontal attack now being made everywhere on the sovereignty of the state, give us reasons to hope that in this realm we are entering upon a great epoch of institutional creativeness.<sup>1</sup> If we have the will and the faith to welcome its coming, we may well make of our times one of the seminal epochs in the history of humanity.

Nor are we asking for the destruction of all that is so fine and distinctive in national life. We are protesting only that one of the forms it has assumed breeds anarchy by its nature, and we seek a safeguard against its dangers. I am not asking that the life of any nation shall be dominated by the power of another. On the contrary, I am seeking the enlargement of its freedom by removing the fear and insecurity that now haunt its frontiers. I seek to replace the rule of force by the rule of law. I seek to make the habits of nationalism fit the patent needs of mankind. At present our world is in perpetual danger of chaos because it is in perpetual danger of conflict. We are not entitled to optimism in face of the dangers we confront. But those very dangers ought to make us urgent about the task of reconstruction. "All things were together," said the old Greek philosopher, "until Thought came and arranged them." If we recognize, in our present

<sup>1</sup> Cf. my *Introduction to Politics*, chap. iv, and Lauterpacht, *Private Law Analogies in International Law*, chap. ii.



situation, the obligation to think out our problems we may yet evade the relentless decree of fate. For fate bids us build an ordered world as the price we must pay for our survival. Do not let the difficulties of that task blind us to the splendour of its achievement.

## APPENDIX TO CHAPTER SEVEN

I leave this essay as it was originally written in 1932. The seven years that have passed since then have, I think, only reinforced the conclusions I have ventured there to emphasize. We have now been drawn into a momentous war which can only be justified by a peace which ends the possibility of aggression in the future by any nation-state. The technical pivot upon which our power to end aggression turns is the abolition of sovereignty. That must involve the rebuilding of a new world-order in which the nation-state is no longer sovereign. It therefore requires us to grapple with the conditions which led to the retention of sovereignty in 1919. This new world-order must be able directly to control all those functions, social, economic, political, in which power-politics are inherent. But it can only control them as there is, *pari passu* with its organization, thorough-going reconstruction of the internal order of each state towards the kind of equality of which this essay speaks.

We have to destroy "Hitlerism." But, to destroy it, we have to remove its causes. That will not be achieved merely by victory in the field. Vital as victory is, the far more important question is what we do with the victory when it is ours. The chance is given to us to learn from the history of the last generation that a world of sovereign national-states means inevitable disaster. We need, therefore, the conditions under which that sovereignty can go, and the institutions through which a new world order can operate. The key to our problems is the organization of an equal

## NATIONALISM AND THE FUTURE OF CIVILIZATION

interest in peace; and that will not come merely by defeating Hitler. It will come only when we recognize that the boundaries between nation-states cannot be permitted, as they are now permitted, to interfere with the total well-being of the *civitas maxima*. That interference will continue so long as the contradiction between the forces of production and the relations of production persist in their present form. We have sought to project the idea of democracy on to the political plane; we have denied it access to the planes of economic and social life. Most of our national societies are, therefore, torn by internal dissensions which, as 1914 and 1939 make clear, cannot be resolved peacefully. We live in a world which faces the alternatives of internal revolution or external war as the only ways in which its pressures can be relieved. We need not live in that kind of world. The defeat of Hitlerism would, if we have the will and the courage, point the way out of it. But we must be prepared to pay the price, and there can be no doubt that the price means the replacement of privilege by equality in social relations. Without that replacement, there cannot be equality in international relations. Without that equality, war will continue (though it need not continue) to be rooted in the relations between men.

*October 18, 1939*

*Mr. Justice Holmes*  
*For His Eighty-ninth Birthday*<sup>1</sup>

## I

THE Supreme Court of the United States is not merely a tribunal where the controversies of men are resolved; it is also a legislature in which the life of a nation is given form and colour. Since John Marshall revealed to the American people what their new constitution might imply, none has so clearly moulded its texture as Mr. Justice Holmes. He stands out in its history not merely as one of the two or three most significant figures in the record, but, also, as one of the supreme expositors of principle in the annals of the Common Law. To read his opinions is to capture once again something of the excitement a lawyer feels when he first reads a judgement of Mansfield or Jessel or Bowen. Here is law in the grand style, law as a part of the living fabric of life, law as literature as well as technic, law as philosophy not less than science. When, twenty-five years ago, John Morley visited America, he came back to affirm that in Mr. Justice Holmes America possessed the greatest judge of the English-speaking world. Time reinforces that emphasis; for it has made of him a member of that supreme fellowship which reaches back to the endless past in which men sought a place for plan and order

<sup>1</sup> Mr. Justice Holmes died in 1934.

MR. JUSTICE HOLMES: FOR HIS EIGHTY-NINTH BIRTHDAY in human affairs. Gaius is there, and Ulpian, Mansfield and d'Aguesseau, Marshall and Savigny and Maitland. I do not think they will resent the company of Mr. Justice Holmes.

He has proved again the simple secret that a great judge must be a great man. He must have a full sense of the seamless web of life, a grasp of the endless tradition from which we cannot escape. He must be capable of stern logic, and yet refuse to sacrifice to logic the hopes and fears and wants of men. He must be able to catch a glimpse of the ultimate in the immediate, of the universal in the particular. He must be statesman as well as jurist, thinker as well as lawyer. What he is doing is to shape the categories through which life must flow, and he must have a constant sense of the greatness of his task. He must know the hearts of men, and yet ask to be judged from the conscience of their minds. He must have a constant sense of essential power, and yet be capable of humility in its exercise. He must be the servant of justice and not its master, the conscience of the community and not of its dominant interests. He has to put aside the ambition which drives the politician to search for power and the thinker to the construction of abstract system. No one must be more aware of the limitations of his material, none more hesitant about his personal conviction. The great judge is perhaps the rarest of human types, for in being supremely himself he must yet be supremely selfless. He has to strive towards results he cannot control through material he has not chosen. He has to be in the great world and yet aloof from it, to observe and to examine without seeking

MR. JUSTICE HOLMES: FOR HIS EIGHTY-NINTH BIRTHDAY  
to influence. A political system which produces great judges can feel some real assurance about its future.

Mr. Justice Holmes has been a great judge because it is in terms like these that he has consistently thought of his work. Whether as Chief Justice in Massachusetts or as a member of the Supreme Court, he has sought to make the infinitely small illuminate the infinitely great. He has had a consistent sense of himself as the servant of great principles, bound to their application not in terms of his personal desires but of their relation to popular will. He has understood the part that development must play in law; has sought, therefore, to safeguard the present from imprisonment in the categories of the past. The test to which he has brought all principle he has been asked to judge is not whether he approved it, nor whether its results may be judged desirable; what rather he has done is to ask himself always whether a reasonable man could do what, on the evidence, a legislature has chosen to attempt. He has not made himself the jailer of experiment, nor has he ever sought to exalt the acts of government over the claims of humble citizens. He has been alert to the needs of power, but critical always of the means by which it sought to realize its end. He has recognized, as some of his colleagues have failed to recognize, that the American Constitution does not forbid experiment, but asks only that experiment shall be tender to established expectation. He has never sought as, again, some of his colleagues have sought, to make his philosophy an absolute, to establish it as a standard to which other men must necessarily conform. His life on the bench has been a process of learning, a



recognition that habits and principles change, that each truth must be borne of someone's experience, that a golden rule is only too often an instrument of persecution. In the result, he has always kept step with the march of the age. He has seen that his task is not the satisfaction of a dead past, but the considered response to a living present. The criterion by which he has worked has been an effort so to shape constitutional dogma that it is not a Procrustes' bed upon which men lose their human shape. He has never forgotten the famous admonition of John Marshall, that it is a constitution he is expounding; and he has ceaselessly remembered that the constitution is not a gate but a road.

This is a general vision; and it is for the technician to expound the particular instance. Here one can only recall the method of approach, the incisive statement of attitude. Most of it, perhaps, is summarized in that famous phrase in the dissent of *Lochner v. New York*: "the Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*." You cannot, he has said in effect, apply to child labour, or the minimum wage, to public utilities, or the exercise of governmental power the methods or the principles which the nineteenth century deemed final. We have new knowledge; we have made new discoveries. The business of the lawyer is to adapt the American Constitution to the demands which new knowledge and new discoveries enable us to satisfy. A thing is not wrong because Chief Justice Marshall could not, a hundred years ago, have conceived it to be right. The American Constitution was not made to compel the

MR. JUSTICE HOLMES: FOR HIS EIGHTY-NINTH BIRTHDAY twentieth-century American to move in the swaddling-clothes of his ancestors' ideas. The American Constitution must be moulded by reason to fit new needs and new necessities. A world of railroads and motor cars, of wireless and the telegram cannot be governed by the standards of an eighteenth-century agrarian state. The law must recognize change and growth even where the lawyer dislikes their implications. He may be sceptical of their implications; he has not the right to substitute his own pattern of Utopia for what they seek to accomplish.

And he has insisted, second, that the American Constitution is a federal instrument. Boston does not set the pattern of its habits, nor does New York, nor Washington. Students of politics will not easily forget the perceptiveness of the decision in *Noble State Bank v. Haskell*, the modern charter of the federal state. For there Mr. Justice Holmes made it plain that not only does federalism mean variety in unity; it means also, in the proper sphere, a license to experiment with the unknown, a right to sail one's ship upon the rocks. He has wisely set his face against the idea that the constituent states of the American Commonwealth are to limit their activities to canons of conduct which some vital interests—the banker's, the business man's, the great corporation's—thought beneficial to themselves. He may have believed the experiment foolish; not seldom one can glimpse a smile of indulgence even in the cold print of the decision. But he has steadfastly refused to substitute his own wisdom for the foolish experiments of others, granted only that the right to experiment is there. He has been the

MR. JUSTICE HOLMES: FOR HIS EIGHTY-NINTH BIRTHDAY judge and not the legislator. He has not sought to usurp the power of the legislature to discover truth even in the most unlikely places.

Nor has he been willing to fasten the grip of nineteenth-century individualism upon the activities of the federal government. He has seen that new administrative possibilities make new law. He has recognized that the problems of a hundred and twenty million people in the modern and positive state are not the problems of the sparse and scattered communities in the America of Hamilton and Jefferson. Where Congress has thought what, on the evidence, a reasonable man might think, he has refused to be outraged by its novelty or dismayed by the increase of its power. He has asked only for proof that the authority sought is one not denied by the Constitution. He has realized that the conception of statehood is not a dogma fixed eternally in 1787, but an elastic formula shaped by the experiences of mankind. His refusal to make his own social philosophy the measure of Congressional action has not been the least force in this last generation in making the Constitution of the United States compatible with the enlargement of American life.

No part of Mr. Justice Holmes's work upon the bench is more likely to prove enduring than the attitude he has revealed to the individual rights the Constitution has sought to safeguard. Some of his decisions, it is safe to say, will in this realm rank with the classic cases in which the frontiers of human freedom have been protected from invasion. It is not, as *United States v. Debs* is there to show, that Mr.

Justice Holmes has made liberty an absolute before which all other considerations fade; his individual is always a member of society, not Crusoe on his island or Stylites on his pillar. But he has refused to say that the citizen is subject to penalties because the opinion he utters is unwise or unpopular or critical of the government of the day. He has insisted that so long as what is said does not directly provoke immediate public disorder it is the business of the Courts decisively to protect freedom of speech. His dissent on *Abrams v. United States* is in the great American tradition; and it is safe to say that it belongs with some half-dozen utterances since the Civil War which show that, despite Governor Fuller and Senator Lusk, American zeal for free inquiry into political foundations can still find classic expression.

It is natural to think of Mr. Justice Holmes as, above all, the great expositor of the Constitution. But it is important to remember how much more, as a lawyer, he is than this would imply. His place is with Maine and Maitland as one of the supreme legal historians of the last sixty years. The *Common Law*, certain papers on agency, a dissertation on the "Path of the Law," all these have been epoch-making pronouncements which definitely broke new ground in juristic science. Dean Wigmore has explained how important a part he has played in the development of the law of torts. Certain footnotes of Maitland and of Pound illustrate how much of the wider aspects of jurisprudence goes back to seminal hints which he scattered, half a century ago, with so liberal a hand. Judges of the new generation like Cardozo and Learned



Hand would be the first to admit how much they have learned from his teaching and example. Mr. Justice Higgins in Australia, Lord Haldane and Lord Sankey in England have emphasized the debt that they owe him. He can claim, in a sense, to have been the first of American judges with a grasp of history sufficiently profound, and philosophic principles sufficiently articulate, to have made the law an incisive expression of general social life. To read his opinions as a whole is to know what Montesquieu would have been like had he presided over a modern court. He, too, like that great pathfinder, has made his place in the canonical succession of those who push forward the boundaries of wisdom in legal institutions.

## II

He has been a great judge because he has never ceased to be a philosopher. He has sought always to find his way from the little fact to the secrets of the universe. By temperament a sceptic, by training a scholar, one sees in his whole attitude to life the qualities which make for wisdom. He has never ceased to inquire. He has never been satisfied to stay still. He has never accepted traditional knowledge because it is traditional. He has never been content to accumulate learning merely for its own sake. His life has been passed in seeking to discover what are the right questions to ask. Where he has been impatient, it has been with those who, like Hegel, make tight and rigid systems of dogma, and do not recognize the need to admit how little we can hope to know. What impresses him is the



MR. JUSTICE HOLMES: FOR HIS EIGHTY-NINTH BIRTHDAY man like Darwin who by slow and patient observation builds new general principles upon the grand scale. It is Plato the artist rather than Plato the philosopher that attracts him. He is for Montesquieu rather than Rousseau, for Maitland rather than Macaulay.

He has always had a sense of the effort involved in thought, with, as a result, a high reverence for the thinker. "Great men," as he has said, "have given their lives to cut pregnant thoughts from the raw material"; and it is the recognition of the sacrifice which thought entails which has shaped the whole contour of his own construction. If I had to find a term for his own philosophic outlook, it is Roman Stoicism that I should choose. The thought that Seneca put into his writings he has relived in his own career. You cannot know ultimate truth. The world is there, and you must respond to the call of duty. Man lives and grows by the quality of the effort he makes to understand. Our life is a battlefield in which victory comes to the stern heart and the taut mind. To expect little and to go on striving is the true secret of happiness. Work and friends sweeten the certainty of ultimate annihilation. We are not the universe but an infinitesimal fragment thrown carelessly into endless space. What becomes us most is humility, and the pride of man who thinks himself Lord of Creation is an inability to grasp his situation and a lack of a sense of humour. Patience, endurance, curiosity, courage, these in the permanent context that truth must stand in the first place always, have been the virtues he has loved best. Lust for power, zeal for wealth have left him utterly unmoved. The

MR. JUSTICE HOLMES: FOR HIS EIGHTY-NINTH BIRTHDAY

men in his own life who have impressed him are those who have wrested some of its secrets from the universe or triumphed over one more barrier that Nature has set in our way.

Of ordinary faith he has none; religious affirmation seems to him the expression of a claim to greater knowledge than he would admit. The ordinary political creeds have never moved him profoundly. He is not a socialist because he is too impressed by the differences between men. He is not a conservative because the inevitability of change seems to him to demand a ceaseless power of adaptation with which conservatism finds it difficult to make terms. "Truth," he has somewhere written, "is the majority vote of that nation that could lick all others"; and by that grim irony he meant that our perceptions become objective by the volume of assent that they win. What he has above all been anxious for is that men should not confound the familiar with the eternal, that they should not postulate their systems of private preference as the inescapable laws of the universe. We are, as he once happily said, private soldiers in an army, and the plan of campaign, if there is a plan, has not been confided to us.

It is a creed which teaches charity, toleration, liberalism. It recognizes without discussion that one's neighbour's view may be deeply rooted in an intimate experience, and that, so far, he is justified in its maintenance. Because it denies absolutes, it refuses persecution; all philosophies have an equal right to win adherents in the open competition of the marketplace. It knows that what we know is never final,

and it is, therefore, insistently curious and insistently receptive. Truth is a moment's perception of what we cannot help believing if we are to make our way in a direction that may answer our wants. There are no final ethics and no final social philosophy. There are first principles that we assume because there is an end we want to reach, an ideal we seek to obtain; and it is the part of a civilized man to know that those first principles can well be doubted. We have our certainties, that is, but we are not entitled to certitude about them. "Our system of morality," Mr. Justice Holmes has written, "is a body of imperfect social generalizations expressed in terms of emotion." Admit that, and the case for imposing it as final disappears. We may insist that it must be applied, but we must be sure always to count the cost of its application.

This attitude it is, I think, which explains why Mr. Justice Holmes has always seemed a radical to conservatives, and why radicals have felt that even in his rejection of their conclusions he is yet a powerful ally. Conservatives distrust his scepticism and his irreverence; they find his dismissal of principles they regard as social ultimate destructive of the foundations of the state. They have been tutored to the belief that there are eternal truths, and they dislike their reduction to the status of codes which have no more than passing significance. They are, indeed, hopelessly wrong in attributing to Mr. Justice Holmes any corpus of radical beliefs; all that he has is a willingness to experiment with novelty in fundamentals. And it is that willingness to experiment which is the basis of his hold over the

radical mind. It has its own private scheme of absolutes; but it recognizes in his temper that scepticism of the instrument which gives new experience its opportunity of expression. The conservative believes that change is erroneous and undesirable; the radical insists that it is necessary and urgent. Mr. Justice Holmes simply urges that since change is inevitable, we must provide for its coming and see to it only that the game is played in terms of the rules. Much of what passes to-day for radical doctrine he would, I think, privately regard as politically unsound and economically unwise. For him Marx is completely unscientific, the Webbs, the spinners of ethereal Utopias, socialists, a party seeking merely to transfer the burden from the strong to the weak. But he would never admit that their philosophies are legitimately excluded from the field of potential experiment. He would fully insist that men may fight for ideals he does not share. He would postulate a recognition that he may be mistaken as the central principle of political justice.

I have called it Roman Stoicism because, like that philosophy at its best, it moves upon the heights. It lacks the enthusiasm of the missionary, the radiance of the acolyte with a new god to proclaim. But it makes for the calm mind, the serene temper, the heart that spends itself in personal affection rather than intellectual hate. There has gone to it the reflective wisdom of sixty years, and it has not been born without pain. It has seen institutions wither and faiths crumble as life has been built upon a wider synthesis of experience. It has, therefore, sought to understand the crude facts of life without repining and to weigh their



MR. JUSTICE HOLMES: FOR HIS EIGHTY-NINTH BIRTHDAY  
significance without fear. It is so conscious of the possibility of error in human constructions that it is sceptical, even a little sad, in the presence of clamant affirmation.

For Mr. Justice Holmes has known that great thoughts come only to men who are capable of heroic self-sacrifice. Every man who is to confront the impenetrable universe proudly must, Galileo-like, face an inquisition none the less formidable because it is ceaselessly active in his own heart. To such a philosophy, optimism is a little crude, and the pessimist confounded by the fruits of the yearning to know. There has been, let it be admitted, profound ambition behind it all; the proud sense of what he has called "the secret, isolated joy of the thinker who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought." It is a philosophy which only a mature and courageous mind may dare to accept, the creed of a soldier in the army of truth. For it is prepared to accept whatever the morrow may bring forth and to adjust its final principles to new verities. It is willing to see the world shaped by other men to a pattern it does not approve. It is content if it knows the joy of ceaseless intellectual curiosity, and has experienced something of that inner ecstasy which comes to those who have made the supreme voyages in the history of the human mind.

### III

Few of us can look back on the memories which make friendship with Mr. Justice Holmes a liberal education.



MR. JUSTICE HOLMES: FOR HIS EIGHTY-NINTH BIRTHDAY

The Civil War, the Boston of Emerson and Lowell, the London in which Mill was still an eminent contemporary, and Morley and Leslie Stephen on the threshold of manhood—to speak with him of the past years is like a study in the intellectual development of the nineteenth century. His house in Washington, where Henry Adams would come to have his glittering generalizations pricked by the sobering nastiness of a fact, the home in Beverly Farms where he would explain to William James that he was a great psychologist and a dubious metaphysician, these have been to many of us another university where, from friendship, we have half-consciously learned wisdom.

The talk of Mr. Justice Holmes is a thing that few of us who have ever heard it can forget. Nothing is taken for granted, and everything is acceptable save the pompous and the rhetorical. It is swift, racy talk, never self-absorptive, always a little ironical, happy in the marshalling of ideas, rich in allusion. Sometimes his gods have not been ours, and there has been a half amused defence in terms of an attack upon the new idols. We have not seen why he continues to respect Herbert Spencer, and we have learned something of the release Spencer implied to that generation. We have decried Emerson as excessively sententious, and there comes a reminder, verified by the right texts, of how true a poet Emerson was. We have exalted Plato, or Pascal or Newman; and we are made to prove our thesis point by point until a brave epigram perishes in the acid solvent of exaggeration made manifest. We eulogize the aesthetic perception of Henry James, and we are smilingly asked whether

it is not the first duty of a novelist to be able to tell a story. We hear a resounding attack upon Rousseau and make protest; we plead for a re-reading of the text. Then comes a letter in which explanatory recantation is made. If I may so phrase it, talk with him is a lesson in the art of thinking quantitatively. You learn why you put a particular value upon man or book or idea and not a different value. And that vivid, restless mind plays round the whole scheme of discussion, eternally free, because eternally vigilant.

Lord Haldane used to say that Mr. Justice Holmes was, with Morley and Gambetta, one of the three best talkers he had ever known. Here one must differentiate. Gambetta, by all accounts, was not a talker, but a specialist in monologue; and Morley less drew you out than made your observations the basis upon which to build reflections of his own. The judge's talk is of a different kind. It is a co-operative examination of ideas, a hunt with you after an exciting quarry which lurks just over the horizon. There is never an assumption of superiority, never an unfair use of experience, always a willingness to accept the palpable hit. It is like a Platonic dialogue in which Plato allows honest play to the opponents of Socrates. It combines gaiety with illumination, wit with gravity, the flashing phrase with careful precision. No platitudes pass muster in that ample book-lined study in Washington just because they are the commonplaces of tradition; and novelty is rarely eulogized just because it is the fashion of the hour.

It is significant that he has always been loved by the young and that, down to this hour, they have never

felt oppressed by the burden of his years. Partly, that is because he takes endless pains to understand them; partly because he is always so anxious to give them of his best. No man of our times has been so eager to know the best there is in the experiment of the moment. No thinker, no poet, no scientist, but he is anxious to sample lest he omit some experience of what may prove precious in the heritage. He will finger the pages of T. S. Eliot to-day in the same quick search for enchantment as sixty years ago he fingered the pages of Tennyson or Whitman or Browning. He will read the last paper of Dewey or Morris Cohen with the same grave attention he has given to Bradley and Spencer. The last great discovery in science gives him the same thrill of excitement that he had when Darwin first gave him the sense of new horizons in the universe. He is inescapably young; and the permanence of his intellectual curiosity makes him friend as well as master.

His temper is that of the soldier and the aristocrat. You see the soldier in him in his sense of the greatness of great action, even more, perhaps, in his sense of great thought as itself great action. Courage, whether it is that of Scott in those last moments in the wastes of the Antarctic, of the soldier on the battlefield, the physician in the typhus-stricken zone, commands his unstinted admiration. There is a flash of the eye, a ring in the voice which are unmistakable. He is an aristocrat in curiously diverse ways. Partly, one sees it in the courtesy, the grave insistence that you are his equal, the careful refusal to say one word that may inflict unnecessary pain. Partly, also, one realizes it in the aloofness from

MR. JUSTICE HOLMES: FOR HIS EIGHTY-NINTH BIRTHDAY the battle-cries of the marketplace, the exquisite sensibility, the constant search for an uncommon beauty which imposes standards as part of the quality of life. He has always wanted certain big things intensely, rather than many things. He has wanted quality of selected experience rather than its amplitude. Mere possession has never interested him, but what he has possessed he has sought to make embody fineness and simplicity. He has never been the aesthete; but he has found the appeal of great art, the etching of Rembrandt, a country scene of Ostade, a Paris bridge of Meryon ultimate and irresistible in their impact. And that aristocracy of temper can be seen, again, in the large part which irony has played in his temperament; for no quality of thought is less popular or less understood.

He has always been intensely American and proud of the tradition for which his America stands. The granite and barberry bushes of Massachusetts, some old house at Newburyport, a great incident in the history of America, one sees as he points them out how large a part America has played in building his philosophy. Perhaps, indeed, nothing plays so much havoc with his general Stoicism as the type of American who is eager, at all costs, to proclaim the superiority of Europe. He has a full sense of the romance of America, the grim conquest of inexorable nature by the pioneers who wrested civilization from a wilderness. A reverence for Athens and Oxford, Paris and Rome has not made him forget Boston and Harvard, Washington and Virginia. Even his criticism of America is always the lover's doubt; and praise of its achievement



MR. JUSTICE HOLMES: FOR HIS EIGHTY-NINTH BIRTHDAY strikes a chord of eager response in him. I have never seen him happier than on an evening in Beverly Farms when Felix Frankfurter spoke to him of the sense of emancipation America had conferred upon a young immigrant from Europe.

But that love of America has never been narrow or exclusive. It is not a denial of alien experience or an unwillingness to admit the value and validity of alien tradition. Nor is it merely a pride in bigness, the worst illusion of the petty mind. He has the cosmopolitanism of the great scholar, the sense that knowledge overleaps national boundaries, the power to co-operate with others that comes of the feeling that the task is great and the individual small. And his scepticism has never allowed him to build a sense of values merely in American terms because he knows how wide and complex is the inheritance of America. No one whose mind, like his, has sought to glimpse the whole intellectual heritage of the human race can ever remain prisoned in a jealous patriotism.

If I had to estimate the two qualities in him that have impressed me most, they would be the depth of his sense of justice and the degree to which his mind is open. No judge has ever sat upon the Bench who has been more endlessly anxious about the substance of his decisions; I have seen something of the care and pain and toil which go to their making. If they read like great literature, it is because great literature is always born of the artist's ceaseless travail. Anyone who knows what agony of mind went to the grave dissent in the Frank case, or the ultimate refusal to interfere in the last tragic hours of Sacco and Vanzetti,



MR. JUSTICE HOLMES: FOR HIS EIGHTY-NINTH BIRTHDAY had an incomparable lesson in what justice can be at its best and highest. He has never been mistaken where effort could have repaired error. No judge has been more anxious to watch in himself and so control what he has termed the "inarticulate major premise" which is so vital a part of judgement.

So, too, with openness of mind. His critics have too seldom realized what a victory his method is of intelligence over instinctive prejudice. The Boston Brahmin is, often enough, an interesting and distinguished type; but he seldom admits, even to himself, that difference of opinion is legitimate. The supreme degree in which Mr. Justice Holmes has schooled himself to tolerance makes one humble in its presence. I have heard him seek to explain, even to defend, men who in hopes, or character, or ideals are utterly alien from his outlook. He is far less critical of the enthusiasm of others than he is of his own. He is more quick to accept a just criticism, more anxious to understand a view with which he does not sympathize than anyone I have ever known. He is impatient only with the bombastic, the rhetorical, and the pompous. He is prepared to examine any view, granted only that it is sincerely held and intelligently defended. Friendship with him, in this realm, is a great lesson in humility.

And he has indeed possessed a genius for friendship. I have come across men who have met him only once and counted that hour a landmark in their lives. I have known those who have not seen him for a ten years' interval, who yet feel that their communion with him is constant and intimate and full. Friendship with him is a bond that has made instant friendships

MR. JUSTICE HOLMES: FOR HIS EIGHTY-NINTH BIRTHDAY

over the spaces of the world. None of us who love him feels that he is old, only that he is more experienced than we are. None of us who love him but feel, also, that his friendship has dignified and enriched our lives. He keeps affection irresistibly. He, who can give so much, asks for so little. We cannot count his kindnesses, nor measure his inspiration. We know only that we are different and better because he lives and we have loved him. We feel in the things he has done and thought and felt something of that rare beauty which justifies the mystery of life.



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